COPY BOUND CLOSE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

OCT 5 1972
MICHAEL RODAK, JR., CLERK

No. 72-550

CAROLYN BRADLEY, *et al.*,

Petitioners,

vs.

THE STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

LOUIS R. LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103

WILLIAM L. TAYLOR
Catholic University Law School
Washington, D.C.

JAMES R. OLPHIN
214 East Clay Street
Richmond, Virginia 23219

M. RALPH PAGE
420 North First Street
Richmond, Virginia 23219

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

Attorneys for Petitioners

IN CENTER

INDEX

	PAGE
Opinions Below	1
Jurisdiction	3
Question Presented	4
Constitutional and Statutory Provisions Involved	4
Statement	5
A. Background of the Litigation: School Segregation and Desegregation in Virginia	5
B. The Greater Richmond Community	15
1. Schools in the Community	18
2. Changing Internal Demography	21
C. The Litigation Below	26
1. Prior Proceedings	26
2. Proceedings on the 1970 Motions for Further Relief	27
3. Conditions at the Time the District Court Rendered Its Judgment	34
4. The District Court's Ruling	36
Reasons for Granting the Writ	40
I. The Fourth Circuit's Decision Balkanizing *Brown* v. *Board of Education* Is of Grave and Widespread Importance Because It Broadly Denies the Promise of *Brown* to the Children of the Metropolitan Ghetto	46

PAGE

A. The Fourth Circuit Essentially Confines Federal Court Remedies for Unconstitutional School Segregation Within the Limits of Individual School District Boundary Lines 46

B. The Decision Critically Impairs the Powers of the Federal Courts to Do the Vital and Difficult Job of Desegregating the Schools of the Nation's Metropolitan Ghettos 54

II. Questions Raised by the Fourth Circuit's Decision Require Authoritative Resolution by This Court, for the Guidance of the Lower Courts in Numerous Cases 64

A. The Decision Conflicts With Decisions in Other Circuits 64

B. The Decision Has Immediate Implications for the Efficient Conduct of Litigation Pending in Seven Circuits 65

III. This Case Presents an Excellent Opportunity for the Court to Consider, and to Guide the Lower Courts in Consideration of, the Question of Multi-District Desegregation Decrees in the Metropolitan Context 67

IV. The Fourth Circuit's Decision Departs From Settled Principles and Calls Into Question Doctrines That Are Indispensable Safeguards of the Right of Racial Equality 74

COPY BOUND CLOSE

PAGE

A. The Decision, Focusing Only Upon Individual School Districts, Ignores the Affirmative Obligation of the State to Comply With the Commands of the Fourteenth Amendment and of *Brown* v. *Board of Education* 74

B. The Court's Extension of the Tenth Amendment Into Conflict With the Fourteenth Disturbs Established Law 77

C. The Court Reintroduces Into the Law of the Fourteenth Amendment a Test of Invidious "Motivation" or "Purpose," Which This Court and the Lower Courts Have Rejected in Related Contexts as Inadequate to Protect the Right of Equality 80

D. The Decision Unduly Curbs the Vital Power of the Federal Courts to Remedy Unconstitutional School Segregation, and Trammels the Traditional Flexibility of Equitable Relief That Was Reconfirmed in School Cases by *Swann* 83

CONCLUSION 88

TABLE OF AUTHORITIES

Cases:

Adkins v. School Bd. of Newport News, 148 F. Supp. 430 (E.D. Va.), aff'd 246 F.2d 325 (4th Cir.) cert. denied, 355 U.S. 855 (1957) 10, 12n

Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969) 28n, 42n, 53n

Allen v. County School Bd. of Prince Edward County, 207 F. Supp. 349 (E.D. Va. 1962) 6n

IN CENTER

PAGE

Arthur v. Nyquist, Civ. No. 1972-325 (W.D. N.Y.) 66n
Atkin v. Kansas, 191 U.S. 207 (1903) 79n

Baker v. Carr, 369 U.S. 186 (1962) 78n
Board of Supervisors v. County School Bd., 182 Va. 266, 28 S.E.2d 698 (1944) 6
Bradley v. Milliken, C.A. No. 35257 (U.S.D.C., E.D. Mich.), on appeal, No. 72-8002 (6th Cir.) 64n
Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971) 61n, 64n
Bradley v. School Bd. of Richmond, 382 U.S. 103 (1965) 5n, 26
Bradley v. School Bd. of Richmond, 462 F.2d 1058 (4th Cir. 1972) 1
Bradley v. School Bd. of Richmond, 456 F.2d 6 (1972) 3
Bradley v. School Bd. of Richmond, 345 F.2d 310 (4th Cir. 1965), rev'd 382 U.S. 103 (1965) 3, 12n, 26
Bradley v. School Bd. of Richmond, 317 F.2d 429 (4th Cir. 1963) 3, 26
Bradley v. School Bd. of Richmond, 338 F. Supp. 67 (E.D. Va. 1972) ..... *passim*
Bradley v. School Bd. of Richmond, 325 F. Supp. 828 (E.D. Va. 1971) 3, 29n, 34
Bradley v. School Bd. of Richmond, 324 F. Supp. 456 (E.D. Va. 1971) 3
Bradley v. School Board of Richmond, 324 F. Supp. 439 (1971) 2, 32n
Bradley v. School Board of Richmond, 324 F. Supp. 401 (1971) 2, 32n
Bradley v. School Board of Richmond, 324 F. Supp. 396 (1971) 2, 32n
Bradley v. School Bd. of Richmond, 51 F.R.D. 139 (E.D. Va. 1970) 2, 30, 31

COPY BOUND CLOSE

PAGE

Bradley v. School Bd. of Richmond, 317 F. Supp. 555 (E.D. Va. 1970) 2
Brinkman v. Gilligan, Civ. No. 72-137 (S.D. Ohio) 66n
Broughton v. Pensacola, 93 U.S. 266 (1876) 79n
Brown v. Bd. of Educ., 349 U.S. 294 (1955) ..... *passim*
Brown v. Bd. of Educ., 347 U.S. 483 (1954) ..... *passim*
Brown v. Swann, 35 U.S. (10 Pet.) 497 (1836) 84n

Calhoun v. Cook, 451 F.2d 583 (5th Cir. 1971) 61n, 64n
Calhoun v. Cook, 430 F.2d 1174 (5th Cir. 1970) 28n
Calhoun v. Cook, Civ. No. 6298 (N.D. Ga.) 66n
Calhoun v. Cook, 332 F. Supp. 804 (N.D. Ga. 1971) 64n
Camp v. Boyd, 229 U.S. 530 (1913) 84n
Carter v. West Feliciana Parish School Bd., 396 U.S. 290 (1970) 28n
Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956), cert. denied 353 U.S. 910 (1957) 12n
Cassell v. Texas, 339 U.S. 282 (1950) 81
Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972) 81
Cisneros v. Corpus Christi Independent School Dist., No. 71-2397 (5th Cir., Aug. 2, 1972) 81n
City of Richmond v. Deans, 281 U.S. 704 (1930) 24n
Comanche County v. Lewis, 133 U.S. 198 (1890) 79
Cooper v. Aaron, 358 U.S. 1 (1958) 75
County School Bd. of Prince Edward County v. Griffin, 204 Va. 650, 133 S.E.2d 565 (1963) 9n, 11
Crawford v. Board of Educ. of Los Angeles, No. 822-854 (Super. Ct. Cal., Jan. 11, 1970) 61n

Davis v. Board of School Commr's, 402 U.S. 33 (1971) 37n, 40n, 51n, 54n, 62n, 83n, 85n, 86n

E IN CENTER

PAGE

Direction der Disconto-Gesellschaft v. United States Steel Corp., 267 U.S. 22 (1925) 41n

Evans v. Buchanan, Civ. No. 1816 (D. Del.) 66n

Ford Motor Co. v. United States, 405 U.S. 562 (1972) 84n
Franklin v. Quitman County Bd. of Educ., 288 F. Supp. 509 (N.D. Miss. 1968) 76n

Gaston County v. United States, 395 U.S. 285 (1969) .. 25n
Gomillion v. Lightfoot, 364 U.S. 339 (1960) 79n, 80, 81
Graham v. Folsom, 300 U.S. 248 (1906) 78n
Green v. County School Bd., Va., 391 U.S. 430 (1968) 5n, 14, 27, 40n, 53n, 54n, 62n, 82n, 85n
Green v. School Bd. of Roanoke 304 F.2d 118 (4th Cir. 1962) 12n
Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964) 5n, 6n, 11, 75n, 76n
Griffin v. State Bd. of Educ., 296 F. Supp. 1178 (E.D. Va. 1969) 11n
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 25n, 81

Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961) (three-judge court), aff'd 368 U.S. 515 (1962) 76n
Haney v. County Bd. of Educ., 429 F.2d 364 (8th Cir. 1970) 65n, 68n
Haney v. County Bd. of Educ., 410 F.2d 920 (8th Cir. 1969) 65n, 68n, 79n
Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959) .. 9n
Hawkins v. Town of Shaw, 461 F.2d 1171 (5th Cir. 1972) 81
Haycraft v. Board of Educ., Civ. No. 7291-G (W.D. Ky.) 66n

COPY BOUND CLOS

PAGE

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 84n
Henry v. Clarksdale Municipal Separate School Dist., 433 F.2d 387 (5th Cir. 1970) 69n
Higgins v. Grand Rapids Bd. of Educ., Civ. No. 6389 (W.D. Mich.) 66n
Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) 81
Hunter v. Pittsburgh, 207 U.S. 161 (1907) 78, 79

James v. Almond, 170 F. Supp. 331 (E.D. Va.) appeal dismissed, 359 U.S. 1006 (1959) 9n
Jones v. School Bd. of Alexandria, 278 F.2d 72 (4th Cir. 1960) 12n

Kennedy Park Homes Assn., Inc. v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970) 81

Lee v. Macon County Bd. of Educ., 448 F.2d 746 (5th Cir. 1971), 455 F.2d 978 (5th Cir. 1972) 65n
Lee v. Macon County Bd. of Educ., 267 F. Supp. 458, aff'd sub nom. Wallace v. United States, 389 U.S. 215 (1967) 13n, 76n
Louisiana v. United States, 380 U.S. 145 (1965) 86
Loving v. Virginia, 388 U.S. 1 (1967) 87n
Lumpkin v. Dempsey, Civ. No. 13,716 (D. Conn., Jan. 22, 1971) 66n

McLaughlin v. Florida, 379 U.S. 184 (1964) 87n
McLeod v. County School Bd. of Chesterfield County, Civ. No. 3431 (E.D. Va.) 19n
McNeese v. Board of Educ., 373 U.S. 668 (1963) 12n
Mobile v. Watson, 116 U.S. 289 (1886) 79n
Morgan v. Hennigan, Civ. No. 72-911-G (D. Mass.) 66n
Mount Pleasant v. Beckwith, 100 U.S. 514 (1879) 79n

IN CENTER

PAGE

N.A.A.C.P. v. Patty, 159 F. Supp. 503 (E.D. Va. 1968), rev'd on other grounds sub nom. Harrison v. N.A.A.C.P., 360 U.S. 167 (1959) 23n
North Carolina State Board of Educ. v. Swann, 402 U.S. 43 (1971) 54n, 62n, 68n
Northcross v. Board of Educ. of Memphis, Civ. No. 3931 (W.D. Tenn., Dec. 10, 1971), aff'd No. 72-1630 (6th Cir., Aug. 29, 1972) 26n

Palmer v. Thompson, 403 U.S. 217 (1971) 81

Reynolds v. Sims, 377 U.S. 533 (1964) 79n
Robinson v. Shelby County Bd. of Educ., 330 F. Supp. 837 (W.D. Tenn. 1971), order aff'd 6th Cir., No. 71-1966 (Sept. 21, 1972) 65n

Shapleigh v. San Angelo, 167 U.S. 646 (1897) 79
Spangler v. Pasadena City Bd. of Educ., 311 F. Supp. 501 (C.D. Cal. 1970), order denying intervention of additional parties aff'd, 427 F.2d 1352 (9th Cir. 1970) 61n
Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) ..... *passim*
Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138 (4th Cir. 1970), rev'd 402 U.S. 1 (1971) 28

Taylor v. Coahoma County School Dist., 330 F. Supp. 174 (N.D. Miss.), aff'd 444 F.2d 221 (5th Cir 1971) .. 65n
Thompson v. County School Bd. of Hanover County, 252 F. Supp. 546 (E.D. Va. 1966) 22n
Turner v. Fouche, 396 U.S. 346 (1970) 81

United States v. Armour & Co., 402 U.S. 673 (1971) 85n
United States v. Board of Educ. of Baldwin County, 423 F.2d 1013 (5th Cir. 1970) 38n

PAGE

United States v. Board of School Comm'rs, 332 F. Supp. 655 (S.D. Ind. 1971), mandamus denied, No. 72-1063 (7th Cir., Feb. 2, 1972), cert. denied, 32 L.ed. 2d 805 (1972) 62n, 66n
United States v. Crescent Amusement Co., 323 U.S. 173 (1944) 85n
United States v. Georgia, Civ. No. 12972 (N.D. Ga., Dec. 17, 1969), rev'd on other grounds, 428 F.2d 377 (5th Cir. 1970) 13n
United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966); on rehearing *en banc*, 380 F.2d 385 (5th Cir. 1967) 75
United States v. Loew's, Inc., 371 U.S. 38 (1962) 85n
United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) 85n
United States v. School Dist. No. 151, 286 F. Supp. 786 (N.D. Ill. 1967), aff'd 404 F.2d 1125 (7th Cir. 1968), on remand, 301 F. Supp. 201 (N.D. Ill. 1969) ..61n
United States v. Scotland Neck City Bd. of Educ., 33 L.ed.2d 75 (1972) 79n, 83
United States v. Texas, 321 F. Supp. 1043 (E.D. Tex. 1970), 330 F. Supp. 235 (E.D. Tex.), supplemental order of April 19, 1971 (unreported), modified and aff'd 447 F.2d 441 (5th Cir.), stay denied, 404 U.S. 1206 (1971) (Mr. Justice Black, Circuit Justice), cert. denied, 404 U.S. 1016 (1972) 13n, 65n, 76n
United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968) 85n
United States v. United States Gypsum Co., 340 U.S. 76 (1950) 85n

Wheeler v. Durham City Bd. of Educ., Civ. No. C-54-D-60 (M.D. N.C.) 66n
Wright v. Council of the City of Emporia, 33 L.ed.2d 51 (1972) 5n, 7n, 67, 76n, 79n, 83

Statutes:

PAGE

28 U.S.C. § 2281 ..... 32n
Rule 19, F.R.C.P. 29
Virginia Constitution of 1971, Art. VIII, §§ 1-7 4
Virginia Constitution of 1902, §§ 129, 130, 132, 133 4
Va. Code Anno. §§ 22-1, -2, -7, -30, -34, -100.1 through -100.12 (Repl. 1969) 4
Va. Code Anno. §§ 22-1.1, -2, -7, -21.2, -30, -32, -100.1, -100.3 through -100.11, -126.1, -127 (Supp. 1972) ..4, 39, 67n
Va. Code Anno. § 22-188.51 (Repl. 1969) 9n
Va. Acts 1956, Ex. Sess., ch. 68, p. 69, 1 Race Rel. L. Rep. 1103 9
Va. Acts 1956, S.J.R. 3, p. 1213, 1 Race Rel. L. Rep. 445 9

Other Authorities:

[1972] Ayer Directory of Publications 73n

117 Cong. Rec. S17516-S17518 (daily ed., Nov. 3, 1971) 60n

Hearings Before the Senate Select Committee on Equal Educational Opportunity, 92d Cong., 1st Sess., on Equal Educational Opportunity, Part 21, Metropolitan Aspects of Educational Inequality (Nov. 22, 23, 30, 1971), 10913 ..... 58n

National Advisory Commission on Civil Disorders, Report (G.P.O. 1968 0-291-729) (1968) 55n, 56n, 59n, 60n, 63n

Note, Merging Urban and Suburban School School Systems, 60 Geo L. J. 1279 (1972) 66n

Piven & Cloward, Regulating the Poor (1971) 56n

Rand, McNally & Co., [1972] Commercial Atlas & Marketing Guide 72n

PAGE

K. Taeuber and A. Taeuber, NEGROES IN CITIES (1965).. 25n

United States Bureau of the Budget, Office of Statistical Standards, STANDARD METROPOLITAN STATISTICAL AREAS (1967) 55n

United States Comm'n on Civil Rights, 1 REPORT: RACIAL ISOLATION IN THE PUBLIC SCHOOLS (G.P.O. 1967 0-243-637) (1967) 57n, 62n, 63n

U.S. Comm'n on Civil Rights, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES 1965-1966 (1966) 12n

U.S. Comm'n on Civil Rights, CIVIL RIGHTS, U.S.A. —PUBLIC SCHOOLS, SOUTHERN STATES (1962) 12n

United States Dep't of Commerce, Bureau of the Census, CENSUS TRACTS, CENSUS OF POPULATION AND HOUSING, Richmond, Va. SMSA (PHC(1)-173) (1972) 72n

United States Dep't of Commerce, Bureau of the Census, CENSUS OF POPULATION: 1970 (G.P.O. PCH(2)-48 1971) 21n

United States Dep't of Commerce, Bureau of the Census, CENSUS OF POPULATION: 1970 (G.P.O. PC(1)-B48, October 1971) 58n

United States Dep't of Commerce, Bureau of the Census, 5 CENSUS OF GOVERNMENTS: 1967 (1968) 61n

United States Dep't of Commerce, Bureau of the Census, I CENSUS OF POPULATION: 1960 (G.P.O. 1961) 58n

United States Dep't of Commerce, Bureau of the Census, II CENSUS OF POPULATION: 1950 (G.P.O. 1952) 58n

COPY BOUND CLOSE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-.....

CAROLYN BRADLEY, *et al.*,

Petitioners,

vs.

THE STATE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fourth Circuit, entered in the above-captioned matter on June 5, 1972.

Opinions Below

The opinions of the Court of Appeals for the Fourth Circuit are reported at 462 F.2d 1058* and are reprinted at pp. 557-602 of the Appendix to the Petition for Writ of Certiorari seeking review of this judgment filed in this Court by the School Board of the City of Richmond, Virginia, et al., as petitioners.[1] The opinion of the United States District

---

* Parallel citations are given within this Petition only for the district court opinion, however, since the advance sheet containing the Court of Appeals' opinion was received on the day of printing.

[1] Citations throughout this Petition in the form "A.—" refer to the separate appendix of opinions below and relevant state statutes filed by the Richmond School Board in connection with its petition. The transcript of the August-September, 1971 hearings on the

N CENTER

Court for the Eastern District of Virginia of January 5, 1972, and its implementing order of January 10, 1972, which was reversed by the Court of Appeals, are reported at 338 F. Supp. 67 and are reprinted in the same Appendix at pp. 164-545.

Other opinions and orders of the Courts below related to this litigation are reported or reprinted as follows:

1. District court opinion and order entered August 17, 1970, approving interim plan of desegregation for Richmond, reported at 317 F. Supp. 555 and reprinted at A. 1-47.

2. District court opinion and order entered December 5, 1970, granting motion for joinder of additional parties defendant and directing the filing of an amended complaint, reported at 51 F.R.D. 139 and reprinted at A. 48-57.

3. District court opinion of January 8, 1971 denying motion to recuse, reported at 324 F. Supp. 439 and reprinted at A. 58-90.

4. Unreported district court order of January 8, 1971, as entered *nunc pro tunc* January 13, 1971, on pre-trial motions, reprinted at A. 91-93.

5. Unreported district court order of January 13, 1971 on additional pre-trial motions, reprinted at A. 94-97.

6. District court opinion and order entered February 10, 1971, declining to convene three-judge court, reported at 324 F. Supp. 396 and reprinted at A. 98-106.

7. District court opinion and order entered February 10, 1971 denying motion to dismiss as to certain defendants in

---

issues raised by joinder of the state and county defendants will be cited by individual volume letter designation, *e.g.*, "Tr. A-10." Transcripts of earlier hearings are consecutively paginated and will be cited by date, *e.g.*, "Tr. 8/8/70 102." Exhibit references are to the August-September, 1971 hearings only.

their individual capacities, reported at 324 F. Supp. 401 and reprinted at A. 107-09.

8. District court opinion and order entered April 5, 1971 approving further desegregation plan for Richmond schools, reported at 325 F. Supp. 828 and reprinted at A. 110-55.

9. Unreported district court opinion and order entered July 20, 1971 denying renewed motion to convene three-judge court, reprinted at A. 156-62.

10. Unreported district court order entered September 15, 1971 denying evidentiary motion, reprinted at A. 163.

11. Unreported district court opinion and order issued January 19, 1972 denying stay of January 10 order, reprinted at A. 546-52.

12. Court of Appeals order granting partial stay of district court decree, entered February 8, 1972, reported at 456 F.2d 6 and reprinted at A. 553-56.

13. Amended judgment of the Court of Appeals, entered August 14, 1972, reprinted at A. 603.

Other reported opinions in this case are as follows: 317 F.2d 429 (4th Cir. 1963); 345 F.2d 310 (4th Cir.), *rev'd* 382 U.S. 103 (1965); 324 F. Supp. 456 (E.D. Va. 1971).

Jurisdiction

The opinion of the Court of Appeals was entered June 5, 1972 and its amended judgment filed August 14, 1972. On August 29, 1972, Mr. Justice Marshall extended the time within which this Petition might be filed to and including October 5, 1972. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

Is the constitutional power of a federal court to remedy racial discrimination in the public schools confined within the geographic boundary lines of a single State-created school district in the absence of a showing of racial motivation in the drawing of the district lines?

Constitutional and Statutory Provisions Involved

The case involves the Tenth Amendment to the Constitution of the United States, which reads as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

This matter also involves the application of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

Various provision of Virginia's 1902 and 1971 Constitutions and statutes relating to education which are also relevant to this matter are set out in the separate Appendix filed by the School Board of the City of Richmond (see n. 1 *supra* and accompanying text) at A. 604-23: Constitution of 1902, §§ 129, 130, 132, 133; Constitution of 1971, Art. VIII, §§ 1-7; Va. Code Anno. §§ 22-1, -2, -7, -30, -34, -100.1 through -100.12 (Repl. 1969); Va. Code Anno. §§ 22-1.1, -2, -7, -21.2, -30, -32, -100.1, -100.3 through -100.11, -126.1, -127 (Supp. 1972).

Statement

A. *Background of the Litigation: School Segregation and Desegregation in Virginia.*

In *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 5-6 (1971), describing the cases before it from North Carolina, Georgia and Alabama, Mr. Chief Justice Burger wrote for the Court that "[t]his case and those argued with it arose in states having a long history of maintaining two sets of schools in a single system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race . . . " This matter, too, arises in a State which has, historically and continuously, spared no resource and left unexplored no ingenious device in its effort to maintain segregation in education.[2] This history is important not only because, as in *Swann*, it points to the continuity of judicial effort since *Brown* v. *Board of Education*, 347 U.S. 483 (1954) to devise and implement adequate remedial steps to redress the unconstitutional state policy, but also because the Court below—under the rubric of the Tenth Amendment—attributed to the Commonwealth of Virginia a policy of individual school district sanctity (to which the Court of Appeals said the federal remedial power must defer) that examination of this history makes apparent does not exist and never has existed.

Virginia's public schools were, at the outset, entirely local in character and operation. The earliest education statute of the Commonwealth (1797) merely authorized county officials to construct and operate schools with reven-

---

[2] This Court has decided as many cases involving public school desegregation arising in Virginia as in any other state. A Virginia case was one of those decided with *Brown*; *and see Griffin* v. *County School Bd.*, 377 U.S. 218 (1964); *Bradley* v. *School Bd.*, 382 U.S. 103 (1965); *Green* v. *County School Bd.*, 391 U.S. 430 (1968); *Wright* v. *Council of the City of Emporia*, 33 L.ed.2d 51 (1972).

ues from county taxes. Not until 1869 did the Virginia Constitution and laws create "school districts" and require the establishment of a State-wide public school system. See *Board of Supervisors* v. *County School Bd.*, 182 Va. 266, 268-69, 275, 28 S.E.2d 698, 699, 702 (1944). At the same time, however, a policy of segregation in the public schools was adopted and enforced on a State-wide basis.[3] The actions of Virginia officials, including state educational authorities, make manifest the hierarchy of values when the two policies—localism and segregation—were in conflict. For example, the State Board of Education[4] did not avail itself of its authority to consolidate[5] separate school dis-

---

[3] In 1954, the Virginia Attorney General told this Court that: In general, education in Virginia has operated in the past pursuant to a single plan centrally controlled with regard to the segregation of the races. (Brief for Appellees in No. 3, *Davis* v. *County School Bd.*, O.T. 1954, at p. 15.)

[4] The State Board of Education has the responsibility for the general supervision of education throughout the Commonwealth. Among its specific powers, it prescribes the qualifications for division superintendents, who are to be appointed by the local school boards from a list of eligible persons certified by the State Board, and who receive a salary not less than a minimum established by State law and toward which the State contributes a fixed proportion. If a local board fails to appoint its Superintendent within a specified time after a vacancy occurs, the State Board designates that officer; the current Chesterfield Superintendent was so appointed by State authorities. The State Board also prescribes rules and regulations governing the operation of high schools, examines and certifies teachers and selects textbooks. The ultimate central authority for public education in Virginia has received judicial recognition; in 1962 a federal district court held the public schools within Prince Edward County were "primarily administered on a statewide basis. A large percentage of the school operating funds is received from the state. The curriculums, school textbooks, minimum teachers' salaries, and many other school procedures are governed by state law . . . ." *Allen* v. *County School Bd.*, 207 F. Supp. 349, 354 (E.D. Va. 1962). See also, *Griffin* v. *County School Bd.*, *supra*.

[5] This power was removed from the State Board of Education by the 1971 General Assembly of Virginia, in the course of this lawsuit. See pp. 32-33 *infra*, text at note 53.

tricts into single school divisions (which would at least share the same Superintendent and might then merge their operations[6] under a single school board) despite avowed State policy favoring consolidation;[7] almost without exception, the State Board joined only consenting districts at their request. On the other hand, state authorities actively endorsed and facilitated the establishment and operation of joint schools for blacks which drew their students from within several separate school districts and over distances which sometimes required the black children to board at the school during the week.[8] With the express sanction of

---

[6] The expectation of joint operation which flowed from being named a single school division is well illustrated by the history of *Wright* v. *Council of the City of Emporia*, 33 L.ed.2d 51, 57, 59 (1972). There, after Emporia became a second-class city, politically independent of Greensville County, the city and county were designated a single school division by the State Board of Education and continued to operate their schools together until after entry of an effective desegregation order. In 1969, when the city attempted to operate its own school system, it also sought separate school division status from the State Board even though this was not required under State law.

[7] In 1922 the General Assembly abolished the prior system of separate school districts congruent with magisterial (county subunit) districts following the recommendation of the State Superintendent of Public Instruction that this be done in order to eliminate "[p]urely artificial differences" among the various districts. *Annual Report of the State Superintendent*, 1917-18, p. 14. (PX 124) The State Board of Education has consistently supported consolidation into larger operating units. In 1969, the Board said:

> The State Board, therefore, has favored in principle the consolidation of school divisions with the view to creating administrative units appropriate to modern educational needs. The Board regrets the trend to the contrary, pursuant to which some counties and newly formed cities have sought separate divisional status based on political boundary lines which do not necessarily conform to educational needs. (RSBX 82)

[8] For example, $75,000 in state vocational funds was allocated to assist in the establishment of the Carver High School for black students from Culpeper, Madison, Orange, Green and Rappahannock Counties—a multi-county "school district" of over 1338 square

state authorities, county school systems before and after *Brown* sent their black resident pupils to other school districts (including one in West Virginia) and paid tuition for them.[9] Indeed, the State Superintendent of Public Instruction advised local districts ten days after the *Brown* decision to continue their existing method of operation in each locality, apparently without regard to the decisions.

Immediately after the decision in *Brown* v. *Board of Educ.*, 349 U.S. 294 (1955), the General Assembly of Virginia restructured control of education in the Commonwealth, subjecting all phases of school operation to centralized control and direction in an effort to maintain pupil

---

miles. Detailed regulations for the operation of such facilities were adopted by the State Board of Education in 1946. The State Department of Education assisted in developing transportation systems for these schools and otherwise facilitated their segregated functioning. In the district court's detailed findings of fact (A. 352-56; 338 F. Supp., at 155-57), evidence concerning half a dozen such "joint schools" is summarized: Pulaski-Radford-Montgomery, Christiansburg Institute, Manassas (Prince William, Fairfax, Fauquier), Charlottesville-Albemarle, Lancaster-Northumberland, and Rockbridge-Lexington. Some of these schools did not close as segregated institutions until 1966, 1967 and 1968, respectively.

[9] Voluminous data concerning the shuffling of black students from one school system to another is summarized in the district court's detailed findings of fact (at A. 360-64; 338 F. Supp., at 159-61). Some examples follow:

> Federick County black students attended high school in the separate Winchester city system.
>
> Until 1964-65, black Dixon County students attended high school in Russell County.
>
> From 1955 until 1965 black pupils of Bland County were educated in Tazewell County schools.
>
> From 1945 to 1965 Bath County blacks attended Alleghany County schools.

Between 1941 and 1971, Chesterfield County sent 6,806 pupils to Richmond or Petersburg schools, in addition to any transfers under the tuition grant programs; between 1960 and 1971, a total of 14,522 Richmond students similarly attended other public systems (mostly as a result of annexations).

segregation. (See Virginia's interposition resolution, Va. Acts 1956, S.J.R. 3, p. 1213, 1 Race Rel. L. Rep. 445). In 1956 the Governor was authorized to close any school which was integrated, Va. Acts 1956, Ex. Sess., ch. 68, p. 69, 1 Race Rel. L. Rep. 1103.[10] At the same time, the State Pupil Placement Board was established as an independent state body with plenary power over the assignment of all schoolchildren in the Commonwealth;[11] it continued in existence until 1968.[12] The State Department of Education disseminated information concerning Pupil Placement Board procedures to local school officials, and its employees also served the Board. These and other devices effectively prevented any local school districts from voluntarily undertaking desegregation in accordance with *Brown*, and restricted the elimination of segregation to those school districts involved in federal court litigation where compliance

[10] In 1958 the Governor ordered the State Police to close six schools in Norfolk to prevent the admission of 17 black students. The statutes were declared to be in conflict with the Virginia Constitution in *Harrison* v. *Day*, 200 Va. 439, 106 S.E.2d 636 (1959). (Thereupon, local boards were authorized to close schools to which any federal or state troops, military or civil, were sent. Va. Code Ann. §22-188.51 (Repl. 1969)). A reading of *Harrison* v. *Day* together with *School Bd. of Prince Edward County* v. *Griffin*, 204 Va. 650, 133 S.E.2d 565 (1963) makes clear that the defect under the state constitution was not the exercise of State power to keep local schools segregated, but only the State's assumption of an ultimate power to discontinue local schooling entirely. *Compare James* v. *Almond*, 170 F. Supp. 331 (E.D. Va.), *appeal dismissed*, 359 U.S. 1006 (1959).

[11] A December 29, 1956 telegram from the Pupil Placement Board to then Chesterfield County Superintendent of Schools Fred D. Thompson began: "Under the provisions of Chapter 70, Acts of Assembly, extra session of 1956, effective December 29, 1956, the power of enrollment or placement of pupils in all public schools of Virginia is vested in the Pupil Placement Board. *The local school board, Division Superintendents, are divested of all such powers*" (emphasis supplied) (Tr. F-105-06; PX 122).

[12] Evidence introduced at the trial of this case indicated the recognition of State authorities that the Pupil Placement Board was merely a device to prevent school integration (PX 144-F).

with state procedures had been enjoined or declared unconstitutional. See, *e.g.*, *Adkins* v. *School Bd. of Newport News*, 148 F. Supp. 430 (E.D. Va.), *aff'd* 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957).

When the devices of extreme centralization represented by the school closing and pupil assignment laws failed to prevent desegregation, Virginia accepted the inevitablilty of some integrated education but did all within its means to minimize the amount. A combination of centralist and localist policies was designed, fluctuating from time to time in whatever manner seemed to promise the most successful avoidance of *Brown*. Thus, although pupil assignment powers were returned in 1961 to local boards, criteria essentially identical to those of the Pupil Placement Board (which dealt explicitly with race) were promulgated by the State Board of Education. At the same time, the resources of the State were made available to school districts for the purpose of perpetuating segregation: they received assistance in designing transportation systems to serve segregated schools,[13] legal aid in resisting desegregation litigation, and loans and grants of State funds to construct and operate additional segregated schools either within existing districts or as joint facilities for black students in several districts. State officials continued to urge defiance of this Court's mandates and set the pattern by their own activities, as when the Department of Education continued segregated meetings of state-wide educational personnel until 1965.[14]

At the local level, the new tolerance allowed local school boards—coming only two years after the State had closed

---

[13] In 1963, the State Department of Education drew segregated bus routes—some as long as 20 miles each way—at the request of Henrico officials.

[14] A. 265; 338 F. Supp. at 116; PX 122; RSBX 83.

the schools rather than allow them to open on an integrated basis—was demonstrated in Prince Edward County. When Prince Edward elected to end its public school system rather than desegregate, Virginia's constitution was interpreted by the State courts to allow such closure notwithstanding a constitutional provision requiring the establishment of a system of free public schools. See *County School Bd. v. Griffin, supra; Griffin* v. *County School Bd., supra.*

State authorities continued to function in support of segregation, however. In Prince Edward, they softened the blow by distributing tuition grants, at least to white students, thereby enabling pupils to attend either private schools or public schools in other divisions untainted by desegregation. The tuition grant law that made this possible was originally adopted by the 1956 legislature which passed the school closing laws; in 1958 the State Board of Education issued regulations to implement the statute which provided reimbursement for tuition paid in order to attend another school division if the pupil were assigned to an integrated school or one which had been closed by order of the Governor. The State Department of Education reimbursed localities for the State's share of the grant.[15] The program was expanded in 1960 (when the statute was amended) to include payments to private schools.

The tuition grant system represents an admixture of central state support and decentralized decision-making

[15] Until its termination in 1970, see *Griffin* v. *State Bd. of Educ.*, 296 F. Supp. 1178 (E.D. Va. 1969) (three-judge court), state and local agencies expended almost $25 million under the program, including retroactive grants to Prince Edward County parents. Between 1954 and 1971, $1,697,329.46 in State and local monies were expended in tuition grants for pupils of the greater Richmond area. Of this amount, $894,734.70 was spent between 1965 and 1971 alone.

calculated to preserve segregation. It superseded "localism" *pro tanto*, for the law effectively made it impossible for a given locality to refuse to participate in the program. In the event of non-cooperation by the local authorities, grants would be made directly to parents; and the State withheld an equivalent local share of the State aid funds.[16] Now individual parents were given ultimate control over pupil assignments through the tuition grants.

This massive and continuing exertion of state powers to preserve segregation meant that the only way in which desegregation could be made effective was by judicial decree. The difficulty of bringing individual lawsuits against every school system, and the currency, prior to 1963, of judicial doctrine[17] that impeded enforcement of *Brown*, both substantively and procedurally, resulted in turn in little progress through the courts. Throughout Virginia, compliance with *Brown* remained token or worse.[18] This

---

[16] Evidence domonstrating the extensive state-wide use of the tuition grant programs to perpetuate segregation is summarized in the district court's detailed findings of fact. A. 320-31; 338 F. Supp., at 141-46.

[17] Exhaustion of administrative remedies unless unquestionably futile was required, *e.g.*, *Carson* v. *Warlick*, 238 F.2d 724 (4th Cir. 1956), *cert. denied*, 353 U.S. 910 (1957); *Adkins* v. *School Bd. of Newport News*, *supra*; *Jones* v. *School Bd. of Alexandria*, 278 F.2d 72 (1960), until this Court's decision in *McNeese* v. *Board of Educ.*, 373 U.S. 668 (1963). Similarly, class actions were not permitted until after *Green* v. *School Bd. of Roanoke*, 304 F.2d 118 (4th Cir. 1962). Desegregation was still not widespread after elimination of these problems, however, because ineffective pupil transfer and free choice plans received general approval. *E.g.*, *Bradley* v. *School Bd. of Richmond*, 345 F.2d 310 (4th Cir.), *rev'd on other grounds*, 382 U.S. 103 (1965).

[18] See, *e.g.*, U.S. Comm'n on Civil Rights, CIVIL RIGHTS, U.S.A.—PUBLIC SCHOOLS, SOUTHERN STATES (1962); U.S. Comm'n on Civil Rights, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES 1965-1966 (1966).

was clearly true of the Richmond area schools in the city and Chesterfield and Henrico Counties.

Following the passage of the Civil Rights Act of 1964, the Virginia State Department of Education signed a compliance agreement with HEW in order to remain eligible for federal education funds. Again there was a shift in Virginia's view of the appropriate respective role of state and local authorities: the State Department of Education now claimed to be without power to police the compliance of local districts with federal law regarding student and faculty assignments. This new-found lack of power did not prevent the Department from encouraging resistance by local districts to HEW efforts, however.[19] Despite the State's role as a major source of funds for public education, the Department considered neither the Fourteenth Amendment nor its own compliance agreement as requiring it to withhold state funds or take any other steps against districts operating in violation of the Constitution.[20] As the district court has aptly described it:

> In the years since [*Brown*], the powers of the State Board of Education and the State Superintendent of

---

[19] Although special counsel advised the State Department of Education as early as November, 1965 that free choice plans were probably never going to work satisfactorily and would likely be rejected by HEW and the courts in the near future, the State continued to assist in the defense of free choice and provided no leadership to local school systems faced with the task of desegregating.

[20] *Cf. Lee* v. *Macon County Bd. of Educ.*, 267 F. Supp. 458, *aff'd sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967); *United States* v. *Georgia*, Civ. No. 12972 (N.D. Ga., Dec. 17, 1969), *rev'd on other grounds*, 428 F.2d 377 (5th Cir. 1970); *United States* v. *Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), *supplemental order* of April 19, 1971 (unreported), *modified and aff'd* 447 F.2d 441 (5th Cir.), *stay denied*, 404 U.S. 1206 (1971) (Mr. Justice Black, Circuit Justice), *cert. denied*, 404 U.S. 1016 (1972).

> Public Instruction have varied but slightly; what changes in law have been made have principally been to expand its powers. Other State educational agencies have come into existence and disappeared in intervening years as well. For the major part of this seventeen year period the State's primary and subordinate agencies with authority over educational matters have devoted themselves to the perpetuation of the policy of racial separation. They have been assisted in this effort by new legislation creating such programs as the tuition grant and pupil scholarship systems, the pupil placement procedures, and, by enactment passed while this case was pending, placing new limitations on the power of the State Board to modify school division boundaries. They have employed established techniques and powers as well to perpetuate segregation.
>
> Only very tardily and under the threat of financial coercion has the State Board of Education implicated itself in any respect in the desegregation process. In so doing it has conceived of its affirmative duty very narrowly, confining its efforts to those required by its compliance agreement with the Department of Health, Education and Welfare, and on occasion not even adhering to that.

A. 215; 338 F. Supp., at 93. The desegregation of Virginia public schools thus has rested upon the individual efforts of private litigants and the federal compliance effort unassisted by State cooperation. As a result, there was virtually no real desegregation in the State prior to *Green* v. *County School Bd.*, 391 U.S. 430 (1968). Most desegregation started no earlier than the 1969-70 or 1970-71 school years; the Motion for Further Relief which ulti-

mately led to the order here involved was filed March 10, 1970.

B. *The Greater Richmond Community.*

The order of the district court, reversed by the judgment of which review is sought, was intended to effectuate the desegregation of the public schools in the Richmond, Virginia area—and encompassing that city as well as the counties of Henrico and Chesterfield.[21] Richmond, approximately sixty-three square miles in area, lies nearly at the geographical center of the region and occupies an area both north and south of the James River. Henrico County (244 square miles) entirely surrounds the city at all points north of the James, and Chesterfield County (445 square miles) is likewise completely contiguous with and envelops Richmond south of the James. Other counties to the north and south of Henrico and Chesterfield, respectively, are separated from this Richmond metropolitan area in whole or in part by the Appomattox and Chickahominy Rivers. Virtually all of Henrico and most of Chesterfield County[22] lie within thirty minutes' travel of Capitol Square in Richmond, using regular streets and averaging twenty to forty miles per hour.

The two counties and Richmond are highly interrelated and mutually dependent upon one another. Typical of most urban areas, the central core city has ceased to register increases in population in the decennial censuses;

---

[21] The entire area was a part of Henrico County originally; Richmond and Chesterfield County, among other political entities, were created from it. Subsequently the city annexed various portions of each county from time to time. The last such annexation, from Chesterfield County, occurred in 1970.

[22] This includes all of the areas which, under the plan approved by the district court, would send students at any grade level to a school or schools presently located within the city boundaries.

the additional population growth from 1950 to 1960 occurred in Henrico and in 1960 to 1970 in Chesterfield County; the most densely populated areas of each county are contiguous to Richmond. The 1970 Census reveals a total population of 480,840 in the area: 249,430 in Richmond, 154,364 in Henrico County and 77,046 in Chesterfield County.[23]

A variety of historical, economic and social indicators demonstrate the close functional unity of the area despite its superstructure of three independent political subdivisions. For example, evidence introduced at the trial indicated that prior to the 1970 annexation, over three-quarters of the jobs in the region (78% of those covered by Virginia's unemployment compensation program) were in Richmond, and analyses performed for the Richmond Regional Transportation study projected that the city would retain a similar proportion of metropolitan employment in the future (Tr. A-38, 43; RSBX 54, 55).[24] Similarly, pre-annexation Richmond accounted for 62% of the region's retail sales and 76% of the value added by manufacturing (Tr. A-42, 43).[25] The daily newspapers of general circulation throughout the area[26] are in Richmond, as are most local television and radio stations and a disproportionate number of public and private educational

[23] See table at p. 58 *infra*.

[24] The 1970 Census data which has become available since the trial bears out the projections. See pp. 71-74 *infra*. Evidence introduced at the trial showed that 42% of the attorneys who practiced in Richmond lived in the counties (51.4% reside in the city and 6.6% elsewhere), while approximately one-third of the State Education Department employees live in each of the three jurisdictions.

[25] Figures presently available show an increase in such indices. See text at note 139 *infra*.

[26] Tr. K-85; *cf.* note 45 *infra*.

and cultural facilities; for example, six of seven institutions of higher learning, including a medical college (Tr. A-45, M-12) and the major libraries and museums in the area (Tr. A-46; RSBX 59). Health services for the entire area are concentrated in Richmond (which includes within its boundaries 17 of the community's 18 hospitals), and most residents of the region are born in and die within Richmond.[27] Such public transportation as is available in each of the counties is almost exclusively directed toward travel between suburb and city rather than within each county.[28]

Although the region is divided among three political jurisdictions, among which there is a quite natural competitive spirit in various affairs, there have been numerous common actions for mutual benefit. Henrico County relies upon the fire and police services of Richmond at its county offices, which are located within the city; other parts of the county have in the past received fire protection from Richmond pursuant to agreement. There is presently a reciprocal fire assistance pact between Richmond and Chesterfield County (Tr. L-227). Pursuant to statute, the city and counties share concurrent regulatory jurisdiction over subdivision development in an area five miles around Richmond. The city has entered into 20-year sewage treatment and water supply contracts with Henrico County, which receives 90% of its water from Richmond (Tr. A-117, 120), as well as reciprocal supply agreements for these utilities with Chesterfield County (Tr. A-122-23).

---

[27] Data compiled by the Richmond Planning Department from Bureau of Vital Statistics records showed that 70% of resident Chesterfield mothers, 79% of Henrico mothers and 94% of Richmond mothers gave birth within the city, while 49% of Chesterfield residents, 55% of Henrico inhabitants and 85% of all Richmonders died in the city (Tr. A-46; RSBX 61).

[28] For example, the only public transportation in Chesterfield County is two bus routes from Richmond (Tr. M-16, 17) (*cf.* PX 1).

Reports of the regional planning commission as well as those of independent consultants (some commissioned by county officials) have all noted the marked interdependence of the city and counties. The district court reviews those and much of the evidence introduced at the trial in its detailed findings (A. 401-16; 338 F. Supp., at 178-84);[29] an appropriate summation is the following comment of the Henrico County Circuit Court in a 1964 Richmond annexation suit:[30]

> Although community of interests is not necessarily as vital a consideration as other factors to be considered . . . this Court nevertheless feels that this factor should be given consideration. . . . Dependence of the central city of Richmond and the immediately surrounding county is mutual. [record citations omitted] The evidence shows that the commercial and civic interests of the city and county are largely identical.

1. Schools in the Community.

Each of the three school systems in the Richmond area was strictly segregated at the time of the *Brown* decision, in accordance with Virginia law, and remained so under

[29] We add, among the other factors which we do not detail for the sake of brevity, that Richmond and the two counties form a single Congressional district and that they, along with Hanover County (added by the Census Bureau in 1963 but with somewhat more diffused indices of interrelationship), make up the Richmond Standard Metropolitan Statistical Area. See note 92 *infra*, and accompanying text.

[30] Under Virginia law, cities commence annexation proceedings by passage of an ordinance and filing of suit to annex a specified amount of contiguous territory. A special court is designated which, after hearing, determines whether the prerequisites for annexation are met and then fixes a compensation award. The city may then accept or reject the terms. In 1964, Richmond declined to accept the terms fixed by the Court in its annexation suit against Henrico County and no territory was gained.

the Pupil Placement Board regime.[31] In 1961, this suit was commenced against the original defendants (the School Board of the City of Richmond and the state Pupil Placement Board) and the district court issued a decree directing the board and the Pupil Placement authorities to admit the individual named pupil plaintiffs to the formerly white schools they wished to attend.[32] Similar relief was obtained in Chesterfield County after suit was filed in 1962,[33] but until 1965 there was little more than token desegregation in any of the schools of the region. About that year, freedom of choice plans were adopted in each system—as the result of further judicial proceedings in the Richmond litigation, and following HEW compliance efforts in the two counties.[34] Again, the free choice plans produced little more than token integration (See Appendices to the district court's opinion, A. 524-32; 338 F. Supp., at 234-42.) In 1968-69 all of the traditionally black schools in the three jurisdictions remained all black.

Following threatened termination of federal financial assistance, Chesterfield County closed all formerly black facilities by the 1970-71 school year (its black student population was then less than 10%, down from 20% in

---

[31] While the tuition grant and pupil scholarship programs existed, they were utilized by students in the Richmond area to avoid integration. From 1965 to 1971 alone, grants totalled $462,000 in Chesterfield, $286,000 in Henrico, and $97,000 in Richmond. The three divisions have expended nearly $1.7 million for tuition grants since *Brown*. See n. 15 *supra*.

[32] The Fourth Circuit reversed and directed the entry of a decree on behalf of the class of plaintiffs. 317 F.2d 429 (4th Cir. 1963).

[33] *McLeod* v. *County School Bd. of Chesterfield County*, Civ. No. 3431 (E.D. Va.).

[34] The *McLeod* case lay dormant from 1962 to 1971 and the Department of HEW undertook Title VI enforcement. A motion to consolidate this case with *McLeod* at the beginning of the trial was denied as untimely by the district court.

1954) except for the Matoaca Laboratory school, although significant faculty segregation remained. Similarly, in the 1969-70 school year, and under HEW pressure, Henrico County closed its formerly black facilities (although many were subsequently reopened as "annexes" to formerly white schools); however, zone line alterations resulted in one elementary school becoming over 90% black, and enrolling 40% of the county's black elementary students. It was also during the 1969-70 school year that the Motion for Further Relief was filed in the Richmond case, leading to the elimination of the free choice plan in the city.

Like the political bodies, Richmond's school authorities have worked together to meet the educational needs of the region. A modern vocational-technical training facility is operated by the Richmond system, enrolling a proportionate number of students from the three subdivisions. Together, several specialized joint schools are operated: two centers for mentally retarded children (one located in Henrico and another in that area of Chesterfield County annexed to Richmond in 1970), and a mathematics-science center in Henrico.[25] When annexations have resulted in capacity problems for one of the school districts, students have been educated in one of the other systems by contractual agreement until permanent facilities could be constructed (as was the case after 1970, when 3387 Richmond students continued to attend Chesterfield County schools). One Richmond high school is entirely within Henrico County, and one Richmond elementary school partly in the same county.

[25] Classes at the center are integrated and approximate the region's overall student population ratio.

2. Changing Internal Demography.

The Greater Richmond community experienced its most ustained and substantial growth in the period from just efore *Brown* v. *Board of Educ., supra*, to the present. Although prior to 1940, most of the population growth with- n the region was in the City of Richmond, over 90% of he increase in population since that year has occurred n Henrico and Chesterfield counties. Henrico made its ajor gains from 1950 to 1960, and Chesterfied in the 1960- 0 decade.

The population changes are, of course, reflected in the hanging enrollments of the region's schools. Enrollment n the Richmond system grew from 35,857 in 1954-55 to 7,604 in 1970-71 (including the pupils gained by the 1970 nnexation from Chesterfield County), while Henrico gained 1,328 during the period for a 1970-71 total enrollment f 34,470 and Chesterfield added 14,931 pupils for a 1970- 1 enrollment of 24,063 (reflecting also the pupils lost by he 1970 annexation).

The increasing suburbanization during the period is emonstrated by annexation of portions of Henrico and hesterfield Counties in 1942 (and an attempted Henrico nnexation in 1963) as well as the 1970 Chesterfield annexa- on. Furthermore, most of the population change in the etropolitan region is accounted for by newcomers rather an natural increase. During the 1950-1960 decade, for xample, one-half of Chesterfield's, and three-quarters of lenrico's population growth resulted from in-migration. rom 1960-70 over half of Henrico's increase resulted om in-migration.[26] In the same period, Richmond lost me 33,000 residents.

---

[26] Similar information for Chesterfield County is unavailable nce census figures are not separately set out for the area of the unty annexed to Richmond in 1970. See United States Dep't of

The outstanding characteristic of this population change, however, has been its racially differential impact. Although the overall composition of the region has remained remarkably stable throughout its recent development (in 1940 the black population was 28%; in 1970 it was 26%), the distribution of whites and blacks throughout the area has not. The Richmond suburbs have been virtually restricted to whites. Even with the annexation of a predominantly white portion of Chesterfield County in 1970,[37] in that year the proportion of blacks to total Richmond population was slightly higher, at 42.3%, than it had been in 1960; Chesterfield and Henrico were 11.5% and 6.8% black, respectively.[38] Richmond accounted for only 25% of the white population gain in the SMSA[39] during the preceding decade, while Henrico and Chesterfield Counties received 60%[40] of that increase. On the

---

Commerce, Bureau of the Census, CENSUS OF POPULATION: 1970 (G.P.O. PCH(2)-48, 1971). The preliminary, unedited version of this document (the final figures were not available at the time of trial) was introduced at the trial by Chesterfield County.

[37] The annexation added some 47,000 residents to the city; without it, instead of gaining nearly 30,000 people from 1960 to 1970, Richmond would have lost over 17,000. See *id.* at p. 5.

[38] In the preceding decade, Richmond lost total population but changed from 32% black to 42% black. Henrico more than doubled in size but dropped from 10% to 5% black, and Chesterfield grew by 75% but dropped from 21% black to 13% black. See table at p. 58 *infra*.

[39] In 1963 the Bureau of the Census added Hanover County to its definition of the Richmond Standard Metropolitan Statistical Area, which already had included Chesterfield, Henrico and Richmond. Hanover, which contains 7% of the SMSA population, accounted for 15% of its white population growth from 1960-1970. Its school system, 24% black in 1970, was the subject of separate litigation, see *Thompson* v. *County School Bd. of Hanover County*, 252 F. Supp. 546 (E.D. Va. 1966), and pursuant to an order entered by the same district judge who presided below, its schools were fully desegregated effective September, 1969.

[40] Richmond contains 48% of the total population in the SMSA.

COPY BOUND CL

other hand, Richmond received 75% of the SMSA increase in black population during the decade.

Although at the time of *Brown,* Richmond's student population was 43.5% black and the counties' 20.4% and 10.4% black, respectively, by 1971-72 each county enrolled less than 10% black students while the Richmond system was over 70% black.[41]

The effect of these rapid changes, coming at a time when State and local authorities were steadfastly avoiding their legal obligation to eliminate dual systems of racially identifiable schools, was very significant. Particularly against the background of Virginia history,[42] any marked contrast between the racial composition of schools among the separate divisions made the elimination of racially identifiable schools more difficult due to the ingrained Virginia practice of making racial differentiations. Indeed, both Richmond educators and those from without the Commonwealth testified at the trial that the Richmond school system itself had become identifiable by race so that, realistically, identifiable

---

[41] This distribution differs markedly from that in the counties surrounding. At the southern extremity of Chesterfield are three small "independent" city school systems—Petersburg, Colonial Heights and Hopewell, which are 67%, 0% and 18% black, respectively. The school systems of the counties surrounding the region enroll the following proportions of black students:

Hanover	24%
Charles City	84%
New Kent	56%
Prince George	26%
Dinwiddie	52%
Amelia	64%
Powhatan	40%
Goochland	57%

Each of these counties is far more sparsely settled than Henrico or Chesterfield.

[42] A. 187, 189; 338 F. Supp., at 80, 81. *Cf. N.A.A.C.P.* v. *Patty,* 159 F. Supp. 503 (E.D. Va. 1958), *rev'd on other grounds sub nom. Harrison* v. *N.A.A.C.P.,* 360 U.S. 167 (1959).

SE IN CENTER

schools would remain even were Richmond schools racially balanced, and the district court so found. (A. 201; 338 F. Supp., at 87; see also A. 186, 197, 445; 338 F. Supp., at 80, 85, 197.)[43] The Henrico County Superintendent of Schools testified that when Central Gardens Elementary School was finally desegregated in 1971-72, it was clustered with several other schools rather than being simply paired with the nearest predominantly white school, because in the latter instance, its racial composition (62% black) in the context of the county's overall ratio (8%) would leave it racially identifiable. (A. 395-96; 338 F. Supp., at 175.)

These perceptions of racial identifiability are substantially reinforced[44] by virtue of the contribution made by discriminatory governmental policies[45] toward the sort of

---

[43] Other witnesses offered conflicting opinions; the detailed findings of the district court thoroughly discuss the expert testimony and contain the rationale for the court's resolution of the testimonial conflicts (A. 446-78; 338 F. Supp., at 198-212; see also A. 263; 338 F. Supp., at 115-16).

[44] A. 189-90; 338 F. Supp., at 81. *Cf. Brown* v. *Board of Educ.*, 347 U.S., at 494:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; . . . .

[45] Virginia's policy of segregation has run the gamut from explicit ordinances, *City of Richmond* v. *Deans*, 281 U.S. 704 (1930), through enforceable racially restrictive covenants (which were extensively used in the Richmond area and which were not removed from title insurance policies until 1969 (A. 515; 338 F. Supp., at 228; Tr. E-11; Tr. R-143-44; 6/22/70 Tr. 828-40; PX 90) to discriminatory location of public housing projects (A. 494-97; 338 F. Supp., at 219-20). Likewise, the record reveals considerable private discrimination, doubtless encouraged by the State's official sanction: for example, the Richmond daily newspapers serving the area continued racially separate real estate listings until 1971, when the practice was discontinued in response to threatened litigation by the United States Department of Justice (A. 514-15; 338 F. Supp., at 228; PX 42A-42C). The record also traces in some detail the continuing effects, which have been noted by the President of the United States (A. 516; 338 F. Supp., at 229; PX 126) of the

racial isolation which has occurred in Richmond.[46] Of significance especially is the effect of the massive post-*Brown* programs to construct segregated schools in the metropolitan area:

> People gravitate toward school facilities, just as schools are located in response to the needs of people.

Swann, 402 U.S., at 20.[47]

---

pervasive discriminatory practices of *federal* agencies such as FHA, which have by their financing activities greatly facilitated the process of metropolitan development. The district court further found that to the extent that housing patterns are viewed as the result of economic differentials, see note 46 *infra*, the differences between whites and blacks were attributable in part to the inferior segregated education offered by the Commonwealth of Virginia to those blacks who are now renting or purchasing homes and raising families. *Cf. Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971); *Gaston County* v. *United States*, 395 U.S. 285 (1969). The historic inequality of black schools in Virginia—lower teacher salaries, smaller instructional expenditures, higher pupil-teacher ratios, inferior supplemental services (including libraries), and fewer accredited schools—was fully documented before the district court as confirmed by the Annual Reports of the Virginia Superintendent of Public Instruction.

[46] There was agreement among the expert witnesses that the racial demography of the Richmond metropolitan area was not unlike that found in other metropolitan centers across the nation. Dr. Karl Taeuber testified, based upon his own exhaustive researches on the subject, see K. Taeuber and A. Taeuber, NEGROES IN CITIES (1965), as well as his examination of the available data for Richmond and the two counties, that the disparate racial pattern of residence could not be attributed to either economic influences or the exercise of preference alone, but that the effects of racial discrimination were a major determinant.

[47] School construction throughout the region played a material part in residential development in at least three ways. First, in Richmond, as established black neighborhoods expanded and approached white schools (prior to the start of desegregation), the school authorities redesignated these schools for black pupils, with the result of solidifying the concentration of blacks and limiting their residential movement to areas peripheral to established black neighborhoods. Second, the counties' practice of building only

C. *The Litigation Below.*

1. Prior Proceedings.

This class action to desegregate the public schools of Richmond, Virginia was commenced in 1961 with the filing of a complaint charging officials of the Commonwealth of Virginia (the Richmond School Board and the Pupil Placement Board of the Commonwealth) with racial discrimination against black children. The initial district court order directed that the individual named plaintiffs be admitted to the white schools to which they desired to transfer but denied an injunction in favor of the class. The Court of Appeals reversed in part, directing limited class relief. 317 F.2d 429 (4th Cir. 1963). After further proceedings in the district court, the Court of Appeals rejected plaintiffs' challenge to free transfer desegregation plans and held also that faculty desegregation would not be required. 345 F.2d 310 (4th Cir. 1965). This Court granted certiorari on the issue of faculty desegregation, reversed, and directed that the process of faculty desegregation be commenced. 382 U.S. 103 (1965).

Upon remand from this Court, a consent decree was entered which embodied a freedom-of-choice plan, provided for faculty desegregation, and obligated school authorities to replace free choice if it failed to produce results. However, despite continuation of the patterns of segregation,

---

white schools (during the same period) in their most urbanized areas contiguous to Richmond established a disincentive for blacks to relocate in the suburbs: black children were transported, for example, to Virginia Randolph High School in the northern part of Henrico County or Carver High School near Chester in mid-Chesterfield County—each the only high school for blacks in the respective counties. See *Northcross* v. *Board of Educ.*, Civ. No. 3931 (W.D. Tenn., Dec. 19, 1971) (at p. 10), *aff'd* No. 72-1630 (6th Cir., Aug. 29, 1972). Finally, just as described in *Swann*, 402 U.S., at 21, the process of greatly expanding school capacity for white students outside the city while converting white schools to black schools (rather than closing them) within Richmond had an inevitable correlative effect upon housing segregation.

Richmond school officials took no action, and on March 10, 1970 the plaintiffs filed a motion for further relief, relying upon *Green* v. *County School Bd.*, 391 U.S. 430 (1968).

2. Proceedings on the 1970 Motions for Further Relief.

After the motion for further relief was filed and following an admission by the Richmond School Board that its free choice plan probably did not meet then current constitutional standards, the district court directed submission of new plans of desegregation for the Richmond public schools. Initially the Richmond School Board submitted a plan, prepared with the assistance of the Department of HEW, based upon neighborhood zoning without the utilization of pupil transportation. The plaintiffs, through an educational expert, submitted an alternative plan using all of the techniques subsequently validated by this Court in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), as applied to the schools operated by the defendant Richmond School Board. On June 26, 1970, at the conclusion of an evidentiary hearing on the plan submitted, the district court rejected the HEW plan and afforded the Richmond School Board an additional opportunity to submit its own alternative plan. The Board thereafter proposed a plan which incorporated the use of pupil transportation at the secondary levels but avoided it at the elementary levels, and which would not achieve as much desegregation in the public schools of Richmond as plaintiffs' plan. Following a hearing in August, 1970, the district court permitted the School Board to implement its second plan on an interim basis for the 1970-71 school year, for the explicit reason that sufficient time was no longer available within which to acquire the transportation capacity necessary to implement a plan like that submitted by the plaintiffs, which the district court expressly approved as "reasonable" within the meaning of the then applicable

law [*Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 431 F.2d 138 (4th Cir. 1970), *rev'd* 402 U.S. 1 (1971).] 317 F. Supp. 555 (E.D. Va. 1970).

The district court's opinion and order instructed the Richmond School Board that a plan which achieved as much or more desegregation than that submitted by the plaintiffs would have to be implemented not later than the 1971-72 school year, while again affording the school Board another opportunity to submit such a plan drawn by its officials.

> . . . The Richmond public schools cannot be desegregated without using the techniques used by Dr. Foster such as non-contiguous zoning, pairing, clustering of schools and transportation, . . . [317 F. Supp. at 575]

Accordingly, the School Board was directed to notify the district court within 90 days of the steps it had taken to implement a constitutional plan and of the earliest date such a plan could be put into operation in the Richmond public schools. On November 15, 1970, counsel for the Richmond Board informed the district court by letter that new plans would not be filed until January, 1971.[48]

[48] On December 9, 1971, plaintiffs accordingly filed a motion seeking an order requiring implementation of their alternative plan effective with the second semester of the 1970-71 school year, which they contended was required under *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) and *Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 290 (1970). The district court also had before it a motion of the School Board seeking to vacate a *pendente lite* construction injunction, see, *e.g.*, *Calhoun* v. *Cook*, 430 F.2d 1174 (5th Cir. 1970), which it had issued following the first hearings on the motion for further relief. In an opinion reported at 324 F. Supp. 456 and entered January 29, 1971, the court denied the motion to implement plaintiffs' plan and vacated its injunction as to those proposed construction projects to which plaintiffs had no objection.

On January 15, 1971, the School Board of Richmond filed three alternative desegregation plans limited to the Richmond schools;

In the meantime, on November 4, 1970, the School Board of the City of Richmond filed a motion to join additional parties (the School Boards and Boards of Supervisors of Henrico and Chesterfield Counties as well as their school superintendents, the State Board of Education, and the State Superintendent of Public Instruction) pursuant to Rule 19, F.R.C.P., on the ground that full and effective relief could not be granted to plaintiffs without the joinder of these parties.[49] The district court invited counsel for the parties sought to be joined by the motion to appear and present argument concerning the sufficiency and propriety of the motion. After a hearing before the court

---

following an evidentiary hearing on March 4, 1971 (at which counsel for the added defendants were invited to express any views concerning the appropriate relief required within the City of Richmond should the claim against them be held insufficient), the district court approved one of the plans proposed by the School Board and directed its implementation commencing with the 1971-72 school year. In doing so, the court expressly predicated its conclusion that the School Board's plan met the requirements of the law upon the assumption that no additional relief against the joined parties which might be ordered had yet been litigated. 325 F. Supp. 828, 830 n.1 (E.D. Va. 1971).

[49] On June 25, 1970, Dr. Thomas Little, Associate Superintendent of the Richmond Public Schools, testified on cross examination that if he were directed to develop an optimum desegregation plan for Richmond, such a plan would involve an area larger than the Richmond City school division:

> Q. Dr. Little, assuming transportation of pupils, is there any way to achieve what you consider to be, as an educator, an optimum of desegregation in the Richmond area? A. In the Richmond area, yes.
>
> Q. How would you do that? A. It would involve the involvement of a larger area than the present city boundaries of the City of Richmond.
>
> Q. Are you talking about Henrico County, Chesterfield County, or both? A. Henrico County, Chesterfield County, and the possibility of the general metropolitan area, maybe bordering on, in other counties other than Henrico and Chesterfield. Basically, the problem could be solved within the City of Richmond, Henrico and Chesterfield Counties. [6-25-70 Tr. 1122-23].

and submission of memoranda, the district judge found, without intimating any view on the merits of whatever underlying claims might be made, that it was appropriate to grant the motion in order to litigate the duty, if any, owed by the additional defendants to the plaintiffs or the Richmond School Board. The court noted that its finding with respect to a desegregation plan for the City of Richmond was

> . . . made in the context of litigation between Richmond residents and Richmond officials alone. It is by no means inconsistent with the existence of a duty on the part of officials with broader powers to exercise such powers to afford different or additional relief from what the Court has found to be state-imposed segregation. The addition of further parties, moreover, alters the range of alternatives, some of which may be shown as feasible and more promising in their effectiveness. Green v. County School Bd. of New Kent County. [citations omitted]. It is with an eye to this range of choices between means to provide desegregated schools that the legal sufficiency of a proposed unitary plan is to be tested.

51 F.R.D. 139, 141 (E.D. Va. 1970). At the same time, the district court set forth its view of the issues which would be presented by claims involving the additional defendants, in terms to which the court consistently adhered during subsequent proceedings:

> Certain of the additional parties have a direct affirmative obligation toward the Bradley plaintiffs, and others of them might well be necessary in order that the first can fulfill that obligation; the question remains whether in fact that obligation has been fulfilled. On that point the position of the instant plain-

> tiffs is not clear. They demand a unitary school system. However, whether it is their contention that this may or must be achieved by the formation of a consolidated school division or by other means beyond the power of the present defendants does not appear with clarity from the pleadings. The measure of the effort which may be required of those sought to be joined may depend upon both the extent to which the actions, if any, of these persons or their predecessors have contributed to the existing situation, and also the reasonableness of the remedial steps which are available.

Id. at 143. Accordingly, plaintiffs were directed to file an amended complaint "wherein they set forth both those alleged facts which they contend give rise to an obligation on the part of those joined to take steps to achieve a unitary school system for the class they represent, and also the particular relief demanded." *Id.* at 143-44.

Plaintiffs' amended complaint, filed December 14, 1971, alleged constitutional violations on the part of all added defendants and concluded with a prayer stated in the alternative—the text of which is set out in the margin.[50]

---

[50] "WHEREFORE, plaintiffs respectfully pray that this Court enter its Order requiring all defendants, jointly and severally, to take all necessary action to require forthwith the consolidation or merger of the defendant school systems in all aspects of school operation and administration, including but not limited to, the appointment of an Acting Superintendent to manage the consolidated systems, the merger of the existing boards of education pending the selection, by election, appointment or otherwise, of a new board of education representative of the consolidated systems; and further requiring that that board shall be the successor board of education to the defendants SCHOOL BOARD OF THE CITY OF RICHMOND, SCHOOL BOARD OF HENRICO COUNTY and SCHOOL BOARD OF CHESTERFIELD COUNTY, assuming all rights, powers, responsibilities, duties and obligations presently held, in whole or in part, by the defendant school boards; and further requiring that each defendant shall, by

Following disposition of a series of pre-trial motions by the state and county defendants,[51] the district court conducted a series of pretrial conferences during the spring of 1971 in order to clarify the issues and facilitate the trial.[52] Prior to the start of the trial but following the

---

withholding of funds or accreditation and by the exercise of any and all powers available to each, insure the full cooperation of the other defendants and the prompt accomplishment of said consolidation or merger.

In the alternative, plaintiffs pray that the Court require defendants Board of Supervisors of Henrico County, Board of Supervisors of Chesterfield County, City Council of Richmond, School Board of Henrico County, School Board of Chesterfield County and School Board of the City of Richmond, acting by and through the State defendants, to enter into such agreements, contracts or otherwise to provide for the joint operation of the educational systems of the City of Richmond and the Counties of Henrico and Chesterfield, with free availability of all facilities for pupil attendance, and tri-system-wide assignment of pupils, teachers, school plant, transportation facilities and all other incidents of school operation, to the end that no school within the respective defendant school systems shall be racially identifiable.

Plaintiffs further pray that this Court require the defendants to prepare and submit for approval of the Court a plan for the operation of all of the public schools within the defendant school systems in conformity with the requirements of the Fourteenth Amendment, including but not limited to, the establishment of schools, pupil populations, staffs, faculties, transportation routes and extracurricular activities which are not racially identifiable, and to be effective with the commencement of the 1971-72 school year."

[51] On January 8, 1971, the district court denied a motion to recuse which had been made by several of the added defendants. (A. 58-90; 324 F. Supp. 439). On February 10, 1971, the court denied a motion to dismiss as to certain of the added defendants in their individual capacities (A. 107-09; 324 F. Supp. 401) and on the same date denied the motion of several of the joined parties to convene a three-judge court pursuant to 28 U.S.C. §2281 to hear and determine the cause (A. 98-106; 324 F. Supp. 396). Additional pre-trial motions were disposed of in two unreported orders (A. 91-97).

[52] When the Richmond School Board made known, in the course of the pre-trial proceedings, that it intended to prepare and present a plan for the accomplishment of desegregation in the greater Rich-

filing of the joinder motion and the amended complaint, the General Assembly of Virginia amended the Education Code so as to restrict the previous power of the State Board of Education to subdivide the Commonwealth into school divisions. The new statute, passed by a legislature conscious that the amendment might have an effect on this very litigation, required the consent of existing local school boards and governing bodies of political subdivisions before the State Board might place two or more cities or counties, or a city and one or more county, within the same school division.[53]

Evidence was received August 16-20, 23-27, 31 and September 1-2, 7-10 and 13, 1971.

---

mond community, involving the schools within the Richmond and county systems, the district court urged the parties, and in particular the added state and county defendants, to examine the proposed plan (which the court instructed the School Board to tender prior to the hearing) and confer with the Richmond school officials in order that they might (a) suggest any preferable alternatives to the district court and (b) avoid unnecessary delay in implementation of a metropolitan desegregation plan, should the relief requested in the motion for joinder, amended complaint, and cross-complaint of the Richmond School Board (filed January 15, 1971) be granted. (Tr. 4/23/71 6-9, 39; Tr. N-154, 249). Despite written invitation from counsel for the Richmond Board, the county boards and their administrators never accepted the opportunity to confer in order to improve upon the plan submitted by the Richmond Board to demonstrate the feasibility of the relief, nor did they express a preference prior to the entry of the judgment in the district court for achieving the relief sought by plaintiffs through either consolidation or joint operation pursuant to contract. Nevertheless, the district court's opinion invited post-judgment motions for reconsideration, submitting alternative plans or suggesting improvements to the Richmond School Board plan (A. 519; 338 F. Supp., at 230).

[53] Following enactment of this statute, the motion to convene a three-judge court was renewed (see n. 51, *supra*) and again denied by the district court (A. 156).

3. Conditions at the Time the District Court Rendered Its Judgment.

Upon the implementation of Plan III in Richmond (see note 48 *supra*), the district court was able to measure the effectiveness in eliminating the racial identifiability of schools, of a plan utilizing the known and accepted techniques of desegregation to the maximum extent possible within the City of Richmond. As the court said in approving the plan:

> A comparison of the projected racial attendance figures for each school with the system wide ratio reveals that . . . the School Board, *if this proposal succeeds as planned*, will have eliminated the racial identifiability of each facility to the extent feasible within the City of Richmond.

(A. 121; 325 F. Supp., at 835) (emphasis added).

The 1971-72 enrollment figures available to the district judge prior to his ruling showed not only that Plan III had not "succeed[ed] as planned" upon implementation,[54] but that racially identifiable schools were still maintained within the context of the Richmond community's school system.

In 1971-72 more than half of Richmond's schools were over 70% black, and a fifth were over 80% black. Schools which had always been black—under Pupil Placement, free choice, and the interim plan—remained so: Maggie Walker High School, the original Richmond high school for blacks (77%); Armstrong High (72%); Kennedy High School, physically located within Henrico County (89%); Graves

---

[54] Many schools—particularly traditionally black schools—opened with proportionately greater black enrollments than had been projected (A. 530-32; 338 F. Supp., at 240-42).

middle school (74%); Mosby middle school, the largest in the system, built in 1963 to serve only black pupils (86%); Chandler middle school, converted from a "white" to a "black" school before there was any desegregation (89%); and many elementary schools—some built as or converted to black schools, Baker (80%), Blackwell (85%), Fairmount (80%), Mason (83%), Norrell (83%), Stuart (79%) —others which became black schools during free choice, such as Highland Park (84%).

These results, underlining the attendance of 56% of Richmond's black students in schools more than 70% black, are the more meaningful in the metropolitan context, for Richmond enrolled over 85% of all black pupils in the community while the county systems were each less than 10% black, and most county schools virtually all white. Of the 132 schools operated within the entire area (whose total composition was 65% white), 78 were clearly racially identifiable: 31 were 70% or more black while 47 were over 90% white. The predominantly black schools were clustered within Richmond and the white schools within Henrico and Chesterfield counties.

During the period 1955-1970, the enrollment of white students at schools within Chesterfield and Henrico counties increased by 37,000; in the same period, schools within Richmond experienced a decrease in white enrollment of more than 7500.[55, 56]

The composition of the faculties at the various schools also tended to be correlated with the racial makeup of their

[55] This figure excludes white students added to the city schools by virtue of the annexation of a portion of Chesterfield County in 1970.

[56] The Richmond Board reported a continuing and accelerating loss of white students from its system (A. 521; 338 F. Supp., at 231).

student bodies, although overall there was a smaller percentage of black teachers than students and the differences between schools were not as marked.

At the same time, of the total 106,000 students enrolled in the public schools of the region, some 68,000 received transportation furnished by school authorities. (Of this number, only some 20,000 students were bused in connection with attempted desegregation.) The school systems owned a total of more than 600 buses, most of which were of 66-passenger capacity.

4. The District Court's Ruling.

On January 5, 1972, the district court issued its Memorandum, which contains a short history of the case (A. 164-85; 338 F. Supp., at 70-79), general factual findings and conclusions together with a discussion of applicable legal principles (A. 185-263; 338 F. Supp., at 79-116), and extensive, detailed, specific findings of fact supportive of the general findings and conclusions (A. 185-545; 338 F. Supp., at 116-230).

The district court concluded that, in spite of the implementation of Plan III and the taking of various steps toward desegregation in the county school systems, the schools in Richmond and the counties remained racially identifiable, viewed in terms of the common sense perceptions of students and parents based upon deviations from the community-wide ratio, or of the informed judgment of professional educators, or of the history of discrimination and segregation in Virginia (A. 186-90; 338 F. Supp., at 80-81). Indeed, the court found, such schools would remain under any desegregation plan which might be implemented within the existing district lines (A. 207-11, 236-39; 338 F. Supp., at 90-91, 103-04). Therefore, in light of its obligation (and that of the school author-

ities) to achieve the greatest amount of desegregation practicable, not limited by artificial boundaries,[57] the district court considered whether any compelling or even legitimate State interest in maintaining the existing school district lines would prevent the combination of city and county schools in a desegregation plan which would satisfy that obligation, and thereby eliminate racially identifiable schools (A. 190-93; 338 F. Supp., at 81-83).

In light of the past crossing of division lines freely to perpetuate segregation (A. 193-95; 338 F. Supp., at 83-84), the coincidence of the boundaries with highly segregated residential patterns—which were shown to have resulted in part from racially discriminatory practices by private individuals and public agencies, including the school construction practices of the separate school systems (A. 195-207, 211; 338 F. Supp., at 84-89, 91-92), and the shared control of public education—utilized in the past to avoid and resist desegregation—between local and state authorities, including the shared power to consolidate school divisions (A. 212-21, 227-36; 338 F. Supp., at 92-96, 98-103), the district court concluded that it was appropriate, under the facts and the analogous precedents, to require state and local authorities to act in concert to facilitate execution of a desegregation plan for the Richmond area schools, crossing existing district lines in order to provide effective desegregation (A. 222-26, 239-59; 338 F. Supp., at 96-98, 104-13).

Because of the long delay since this Court's decision in *Brown* in implementing desegregation, which had made vindication of the constitutional mandate far more difficult, the district court determined that adequate relief should be implemented with the 1972-73 school year and

[57] *Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 37-38 (1971).

approved the Richmond Board's plan for achieving metropolitan desegregation, subject to requested modifications or new proposals consistent with implementation in 1972 (A. 259-63; 338 F. Supp., at 114-16).[58]

On January 10, 1972, the district court entered an order in accordance with the opinion (A. 536-45; 338 F. Supp., at 244-48) which established a time schedule within which the state and/or county defendants were to take appro-

---

[58] The metropolitan desegregation plan presented by the Richmond School Board was the only plan put before the court by any of the parties. See note 52 *supra; cf. United States* v. *Board of Educ. of Baldwin County*, 423 F.2d 1013 (5th Cir. 1970). It incorporated consolidation of the existing Richmond, Henrico and Chesterfield school systems into a new structure fashioned in accordance with Virginia law, in addition to the reassignment of students among the various schools in the Richmond community. The plan is briefly described in the dissenting opinion of Judge Winter below (A. 586-89) and in careful detail in the district court's opinion (A. 418-32; 338 F. Supp., at 186-92). Although the Richmond Board's plan was made available to the state and county defendants in advance of trial, in accordance with the district court's instructions, they offered no alternative of their own but did present several expert witnesses who attacked the plan, and particularly its consolidation features. In turn, the plaintiffs and the Richmond Board presented expert testimony in support of the educational soundness and feasibility of metropolitan desegregation in general, and the Board's suggested plan in particular. The district court resolved such conflicts as existed in the expert testimony in favor of plaintiffs and the Richmond Board. (A. 446-78; 338 F. Supp., at 198-212; see also, A. 263; 338 F. Supp., at 115-16.) One of the educators offered by the Richmond Board was Dr. Thomas Pettigrew, who supported the plan on generally accepted educational principles and also because it had the added virtue, in his view, of according with his own interpretation of social science data to the effect that schools between 20% and 40% black will be most successful. The district court recognized Dr. Pettigrew's views (A. 437-39; 338 F. Supp., at 194-95) but hardly gave them controlling weight; however, the Court of Appeals viewed the testimony of Dr. Pettigrew, an educator called to support the feasibility of a plan he had nothing to do with preparing, as indicating that the design and goal of the Richmond Board plan—and hence the district court's order—was the achievement of a "racial balance" (A. 567-70).

priate steps pursuant to Virginia law [Va. Code Anno. §§22-100.1, *et seq.*] to implement the Richmond Board's plan, including the creation of a consolidated school division, transfer of title to school buildings to the new division, and appointment of an acting Superintendent for the new division. Further, the State defendants were directed to promulgate regulations within their statutory authority for the financial operation of the consolidated division, and to prepare an organizational plan for the new division. With the assistance of the counties, they were to adjust the Richmond Board plan to demographic changes and submit any desired modifications of the plan to the district court; and finally, within 90 days they were to submit a detailed plan of execution to the court which, if approved, would be implemented in September, 1972.[59] Following expedited appeal, the judgment of the district court was reversed June 5, 1972 (A. 557-85), Judge Winter dissenting (A. 585-602).[60]

[59] On January 19, 1972, the district court denied a stay of its order pending appeal, noting that the order by its terms would not result in the transfer of any students for six months, during which period essentially planning functions would be carried out (A. 549-50). Thereafter, on February 8, 1972, the Court of Appeals stayed all provisions of the order except those explicitly regarding continued planning, although it left to the State Board's discretion whether a provisional school board for a merged division should be formed; it also expedited the appeals (A. 553-56).

[60] The Court of Appeals' opinion is discussed *infra*, Part I(A) at pp. 46-54.

Reasons For Granting the Writ

The Fourth Circuit's decision should be reviewed and corrected by this Court for the following reasons, which we summarize here and develop in the designated subparts below:

First, the Fourth Circuit has decided a basic legal question standing at the threshold of the most significant school desegregation problem of the times. The question is whether school district or "division"[61] lines impose narrow and inflexible limits upon the otherwise broad and flexible equitable powers of the federal courts[62] to fashion a desegregation decree "'that promises realistically to work, and promises realistically to work *now*.'"[63] (Part I(A), *infra*.) The problem is how to cope with the impacted black center-city schools of large metropolitan ghettos which are impossible to desegregate, or to desegregate effectively, within the narrow, inflexible limits of single-district desegregation plans. (Part I(B), *infra*.)

In many metropolitan areas, as in Richmond, these impacted black schools simply cannot be integrated into a unitary system "without a 'white' school and a 'Negro' school, but just schools"[64] by means of any desegregation plan that is confined to the schools of one school district.

---

[61] What Virginia terms "school divisions" are elsewhere more generally called "school districts." We shall use the terms interchangeably hereafter, ordinarily speaking of "districts" when our discussion is general or national and of "divisions" when we focus upon the Virginia scene.

[62] See *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *Brown* v. *Board of Educ.*, 349 U.S. 294, 300 (1955) [hereafter sometimes cited as *Brown* (II)].

[63] *Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 38 (1971), quoting *Green* v. *County School Bd.*, 391 U.S. 430, 439 (1968).

[64] *Green* v. *County School Bd.*, 391 U.S. 430, 442 (1968).

In other metropolitan areas, single-district plans can palliate the segregation of the all-black center-city schools in some measure, but they cannot achieve "the greatest possible degree of actual desegregation"[65] with the greatest efficiency and the least community cost.[66]

If the Fourth Circuit is correct that the Tenth Amendment or some other abstract doctrine categorically forbids inter-district desegregation orders by the federal courts (in the absence of proof, ordinarily unavailable whether or not the fact be true, that school district lines have been maintained with racially discriminatory motivation), then this Court should surely not delay in saying so. That pronouncement—*Brown* v. *Board of Education*[67] stops short at every district line—ought to come authoritatively or not at all. School officials, communities, courts and lawyers struggling to desegregate metropolitan schools deserve to be told immediately to direct their efforts toward plans, whether or not fully effective, that are district-limited. And where district-limited plans are palpably futile to effect desegregation, they should be told immediately to give desegregation efforts up.

If, on the other hand, as we believe, the Court of Appeals is wrong in allowing every individual school district to "draw a line of fire around its boundaries"[68] through which

---

[65] *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971).

[66] Consider, for example, a school district whose black population is concentrated in a large east-end ghetto. A single-district desegregation plan might require extensive cross-district transportation of students, whereas a plan that included schools of a white residential suburb in the next district to the east, closely contiguous to the black ghetto, could provide far greater integration with far less pupil dislocation.

[67] 347 U.S. 483 (1954) [hereafter sometimes cited as *Brown* (I)].

[68] The phrase is Mr. Justice Holmes', in *Direction der Disconto-Gesellschaft* v. *United States Steel Corp.*, 267 U.S. 22, 28 (1925).

federal courts enforcing *Brown* v. *Board of Education* may not pass, then this Court should still more quickly set that error right. The "obligation of every school district . . . to terminate dual school systems at once" [69] should no longer be deferred in the metropolitan regions of the Fourth Circuit and in other metropolitan regions where the Fourth Circuit's doctrine will be urged—now, more than eighteen years after *Brown* (I)—as a further ground for postponing too-long-postponed desegregation.

Second, the Fourth Circuit's decision is not merely inconsistent with approaches to metropolitan desegregation that have previously been announced by lower federal courts in other circuits. (Part II(A), *infra*.) It also defeats the premises upon which extensive litigation is presently proceeding in numerous of those courts. (Part II(B), *infra*.)

Complaints seeking inter-district metropolitan desegregation orders are pending at this time in district courts in at least six circuits other than the Fourth. If the Fourth Circuit is correct that such orders are doctrinally forbidden (or allowable only upon a showing of racial motivation in the drawing of school district lines), then federal lawsuits in Atlanta, Boston, Hartford, Indianapolis, Louisville, Wilmington, and other cities are now being conducted upon theories that are going to result in a wholly deplorable waste of judicial time.

Invoked by defendants in those lawsuits, the decision of the Fourth Circuit in this Richmond case will abort or radically redirect them—properly, if the decision is correct; intolerably, if it is not. But, whether or not it is correct, if unreviewed it will needlessly complicate and delay litigations that are already sufficiently complicated and

---

[69] *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969).

ıave been more than sufficiently delayed. Under these cir-umstances, the exercise of the Court's *certiorari* jurisdic-ion is uniquely called for, to provide guidance to the ower courts in a matter of the most immediate and wide-pread importance.

Third, the present case presents an excellent vehicle for urnishing such guidance. (Part III, *infra*.) The problems f metropolitan school desegregation are thoroughly ex-lored in the voluminous evidentiary record made before ıe District Court. The District Court has written an nusually comprehensive opinion containing detailed find-ıgs of fact. Much of the background of the case—the his-ory of school segregation and desegregation in Virginia—already well known to this Court.

In that familiar framework, the new issue of metro-olitan desegregation emerges with signal clarity. It is ot confused by adventitious yoking with *de-jure-versus-e-facto* issues (whatever those labels may cover in other ontexts), or with busing issues. (The amount of busing quired by the District Court's Richmond-Chesterfield-enrico unitary desegregation plan does not greatly exceed e amounts previously required in the three divisions con-dered separately; and the Court of Appeals had no oblem concluding that "[t]his is not a bussing case" . 563, n. 2).) Nor is the metropolitan issue compli-ted by a welter of school districts (only three are affected the District Court's unitary plan), or by embarrassing ate-law impediments to their joinder in a single plan the contrary, Virginia law makes express and detailed ovision for virtually every mechanism necessary to effect tri-division consolidation ordered by the District urt).

The ground upon which the Court of Appeals decided case gives rise to a clear-cut legal issue that is illumi-

nated but not entangled by its factual setting. That issue is whether school district boundary lines are sacrosanct as a matter of constitutional law where a federal district court concludes that they must necessarily be crossed in order to desegregate effectively a 70% black city completely surrounded by two 90% white counties, all comprising a metropolitan region that is integrated economically and socially but for race. No significant factual disputes about the characteristics of the Richmond metropolitan area divide the District Court and the Court of Appeals; to the slight extent that those two courts differ in their interpretations of the basic facts, the differences are matters of legal inference which it is the proper office of this Court to decide.

Furthermore, the record and the framing of the issue before this Court will allow the Court to do for multi-district metropolitan desegregation cases what it has previously found it wise to do for other desegregation cases: to "provide some guidelines for the exercise of the district judge's discretion and for the reviewing function of the courts of appeals," [70] without itself entering into nitty-gritty applications of those guidelines in a fashion inappropriate for a court of ultimate review, and without descending to particulars that would frustrate "the appropriate scope of equity." [71] This is so because the decisive issue presented by the case is the doctrinal correctness of the Fourth Circuit's view regarding the constitutional impermeability of school district lines. Once that issue is resolved, the Court can proceed as far as it may then think fitting to define the principles that ought govern application of the remedial discretion of *Brown* (II) and *Swann* in metropolitan contexts. This record will support

---

[70] *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

[71] *Id.*, at 31.

consideration of those principles at whatever level of generalization or detail the Court deems advisable.

Fourth, the Court of Appeals' decision of the threshold legal issue conflicts with and curtails applicable decisions of this Court, and imposes uncertain and unworkable limitations upon established doctrines of constitutional law and federal equitable power. Specifically:

A. The Court of Appeals ignores or eviscerates the vital principle that the Fourteenth Amendment, and its Equal Protection Clause in particular, address their commands to the State; that the State is the ultimate agency which is responsible constitutionally to provide equal protection to the races; and that this responsibility cannot be evaded by the manner in which a State chooses to carve up its territory, arrange its governmental structure, or delegate its functions or authority among internal subdivisions. (Part IV(A), *infra*.)

B. The Court of Appeals turns the Constitution on its head by the unprecedented holding that the Tenth Amendment limits the Fourteenth and insulates a State's internal administrative divisions against federal judicial alteration even where those divisions operate to defeat Fourteenth Amendment rights. (Part IV(B), *infra*.)

C. The Court of Appeals imports into the jurisprudence of Equal Protection a test of invidious racial motivation which this Court has previously been scrupulous to resist, and which threatens to nullify the constitutional guarantee of equal treatment of the races. (Part IV(C), *infra*.)

D. The Court of Appeals impermissibly restricts the remedial powers of a federal court of equity, both as this Court has developed them generally and as it has directed the district courts to use them in school desegregation cases. (Part IV(D), *infra*.)

I.

The Fourth Circuit's Decision Balkanizing *Brown* v. *Board of Education* Is of Grave and Widespread Importance Because It Broadly Denies the Promise of *Brown* to the Children of the Metropolitan Ghetto.

A. *The Fourth Circuit Essentially Confines Federal Court Remedies for Unconstitutional School Segregation Within the Limits of Individual School District Boundary Lines.*

In the opening paragraph of his majority opinion for the Court of Appeals, Judge Craven states the issue as the Fourth Circuit perceives and decides it:

> May a United States District Judge compel one of the States of the Union to restructure its internal government for the purpose of achieving racial balance in the assignment of pupils to the public schools? We think not, absent invidious discrimination in the establishment or maintenance of local governmental units, and accordingly reverse. (A. 562.)

Understood as it must be in the context of this record—with "restructure its internal government" meaning nothing more than to quit treating school division boundary lines as impassable frontiers across which pupils may not be assigned,[72] and "racial balance" meaning nothing less

---

[72] The District Court in this case did, of course, order the consolidation of the school division of the City of Richmond with those of Chesterfield and Henrico Counties, pursuant to the provisions of Virginia law governing school division consolidations. That particular form of inter-division desegregation plan was the product of the history of the litigation, as well as of the characteristics of the Richmond metropolitan area as the District Court found them.

After the District Court had granted the Richmond School Board's motion to join the county and state defendants and had plainly ruled that the Richmond city schools could not be desegregated effectively by a plan limited to the city's boundaries, it permitted ample and reiterated opportunity to all parties to submit plans, assist the court by suggestions, or cooperate with each

[22] *(continued)*
other in devising proposals, for any sort of inter-division desegregation decree that would work. Among all the defendants, only the Richmond School Board offered a plan; and it was this Richmond School Board plan calling for consolidation that the District Court eventually embodied in its opinion and order. (See notes 52 and 58 *supra*.) No defendant in the District Court suggested any form of plan which went beyond the boundaries of the City of Richmond but did not involve consolidation. Quite naturally and properly, then, the District Court took the question before it to be the one on which the parties had drawn issue: whether its decree was legally required to be "circumscribed by school division boundaries." (A. 186; 338 F. Supp., at 79; see the Court's exhaustive discussion of that question at A. 185-263; 338 F. Supp., at 79-116.) A negative answer to that question was accepted by all parties as decisive of the propriety of the Richmond School Board plan.

However, even after its thorough study of the feasibility of the Richmond Board Plan and after writing an exhaustive opinion providing for the manner of implementation of that plan, the District Court showed entire flexibility with regard to its modification. It said that "with the cooperative efforts of the other educators within the proposed Metropolitan Plan, perhaps an even better plan will emerge" (A. 262; 338 F. Supp., at 115); and it expressly stated (1) "that the Court stands ready at any time to consider any proposed modification of the plan to be approved" (A. 519; 338 F. Supp., at 230; see also A. 435; 338 F. Supp., at 193), and (2) that the reason why the court felt it "necessary . . . not to await any proposed modifications, but to order the plan to be implemented" was in order that "a metropolitan school system [providing effective desegregation] will be in effect for the commencement of schools in September 1972" (A. 262; 338 F. Supp., at 115). Once again, then, the state and county defendants had the opportunity to contend—if such was their contention—that the court's basic ruling of the propriety and necessity of an inter-division plan ought not to be implemented by the device of consolidation. They made no such contention, but immediately appealed.

And on the appeal the Fourth Circuit, for its part, plainly and squarely held that the District Court was required to limit its desegregation decree within the boundaries of the City of Richmond. One searches its opinion in vain for any suggestion that it did not think this was the issue before it—albeit couched somewhat hyperbolically in terms of "restructure . . . [of] internal government"—or that the Fourth Circuit would have countenanced any form of desegregation decree by the District Court that exceeded the Richmond city lines. Plainly it was the crossing of those lines, not the District Court's particular manner of crossing them, that the Court of Appeals condemned.

than that "degree of actual desegregation"[73] which the Constitution as construed in *Brown* (I) commands[74]—this

[73] *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971).

[74] Throughout its opinion, the Court of Appeals repeatedly treats the District Court's decree as one designed to achieve "racial balance" rather than constitutionally-compelled desegregation. (See A. 562, 565, 567-70, 578-79, 580). Closely inspected, however, this does not mean what it appears to say. It does not mean either that the District Court undertook to pass beyond the pale of "constitutional violation" into the fields of "educational policy," *Swann*, 402 U.S., at 16, or that the District Court's decree in fact strayed into the educational-policy field.

If the Court of Appeals did think that the District Judge was proceeding on some theory of obligation or power to dictate a non-constitutionally-commanded "racial balance," then its discussion of state school division organization, Virginia's supposed law and tradition of local school administration, the Tenth Amendment, and about ninety-nine percent of its thirty-page opinion for reversal were unnecessary. Reversal was compelled by one sentence quoting *Swann* for the obvious proposition—which the District Court here manifestly understood—that "judicial powers may be exercised only on the basis of a constitutional violation." *Swann*, 402 U.S., at 16. The contradistinction between mere "racial imbalance" and "state-imposed segregation in violation of *Brown I*," *Swann*, 402 U.S., at 17-18, did not escape the District Judge, however; and the Court of Appeals could not conceivably have thought it did. From the inception of his opinion and throughout all that follows, Judge Merhige makes uncontestably clear what he is holding:

> "The Court concludes, in the context here presented, that the duty to take whatever steps are necessary to achieve the greatest possible degree of desegregation in formerly dual systems by the elimination of racially identifiable schools is not circumscribed by school division boundaries created and maintained by the cooperative efforts of local and central State officials. The Court also concludes that meaningful integration in a bi-racial community, as in the instant case, is essential to equality of education, and the failure to provide it is violative of the Constitution of the United States." (A. 185-86; 338 F. Supp., at 79-80.)

The Court of Appeals concedes that the District Court disclaimed any intention of imposing a "fixed racial quota" by its adoption of the Richmond School Board's desegregation plan. (A. 569-70.) But it concludes that "the adoption of the Richmond

is a fair summary of the Fourth Circuit's holding. Other themes are sounded in its opinion but, insofar as these

---

Metropolitan Plan in toto by the district court, viewed in the light of the stated reasons for its adoption, is the equivalent, despite disclaimer, of the imposition of a fixed racial quota." (A. 570.) The key to this sentence is the Court of Appeals' own view of what the "adoption of the Richmond Metropolitan Plan in toto" implied: namely, that, insofar as the plan went beyond the Richmond city line, it went beyond the Constitution. For, apart from that view, it could not be said—and the Court of Appeals does not say—that the "use made of mathematical ratios [in the Metropolitan Plan] was . . . more than a starting point in the process of shaping a remedy," *Swann*, 402 U.S., at 25, or that the District Court required "as a matter of substantive constitutional right, any particular degree of racial balance or mixing," *id.*, at 24. To the contrary, the Metropolitan Plan (1) originated with the Richmond School Board, not the District Court, and was the only inter-division plan put before the Court (see note 72, *supra*); (2) began, and did not end, with mathematical ratios (A. 418-31; 338 F. Supp., at 186-191); (3) contemplated deviation from those ratios not only in proposed subdivision 6 (southern Chesterfield County) as a whole (A. 426; 338 F. Supp., at 189) but wherever else problems of practicality might arise (e.g., A. 424-25; 338 F. Supp., at 188); and (4) was embodied in a decree which the District Court said it stood ready to modify at any time (see note 72 *supra*), and whose modification it invited in the following unmistakable terms:

> "While the viable racial mix contemplated by the plan is educationally sound and would indeed result in a unitary system, variations from that suggested racial mix may be unavoidable. All parties are admonished that it is not the intention of the Court to require a particular degree of racial balance or mixing. If in the implementation of the plan improved modifications seem appropriate, the Court stands ready to entertain them." (A. 519-20; 338 F. Supp., at 230.)

On this record, then, the Court of Appeals' attribution of a "racial balance" order to the District Court is not explained by anything the District Court said or did. That attribution derives, rather, from the disagreement of the Court of Appeals with the District Court upon the one key issue in the case: the significance of school district lines as limits upon the federal courts' remedial obligation and power under *Brown* (II) and *Swann*. (See text, *infra*). Put simply, the Fourth Circuit took the view that school district lines marked the confines of *Brown*; that, once the maximum feasible desegregation that could be achieved without cross-

contribute to the result, they all boil down to the proposition that *Brown* (I) is to be applied only within the walls of individual school districts.[75] School district lines drawn

---

ing those lines had been achieved, each individual district divided by the lines was "unitary" (see note 75, *infra*); and that, at that point "'state-imposed segregation . . . [had] been completely removed,' . . . [and] further intervention by the district court was neither necessary nor justifiable." (A. 581.) Since the District Judge persisted in intervening beyond this point, he must—in the Fourth Circuit's perception—have been trying to achieve "racial balance," not desegregation.

"Racial balance" is thus the Fourth Circuit's term for desegregation pushed too far; it is an appellate conclusion, not a description of what the trial court did; and there would be less accuracy in saying that the District Judge here was forbidden to cross school district lines because he sought "racial balance" than that he was found to have sought "racial balance" because he crossed forbidden school district lines. The critical question remains, as we next develop in the text, whether crossing lines is (as the Court of Appeals held) or is not (as the District Court held) forbidden.

[75] The Court of Appeals states this proposition in two principal ways, and suggests it in a third:

The first way begins with the Tenth Amendment premise that "[o]ne of the powers . . . reserved to the states is the power to structure their internal government" (A. 579), and proceeds to the conclusion that school district lines, as components of that structure, may not be breached by a federal court unless they have been "'used as an instrument for circumventing'" constitutional rights of racial equality (see A. 580). In this formulation, the Fourth Circuit apparently conceives an "instrument" as something "intended to circumvent" the Constitution (A. 580); hence it holds that the boundary lines of local governmental units are unalterable by a federal court seeking means to effect desegregation "absent invidious discrimination in the establishment or maintenance of . . . [those] units" (A. 562), or invidious "motivation" in the placement of the lines (see notes 76-79, *infra*). Related to this theory is the Court's statement that "[t]o approve the consolidation of these three school districts would require us to ignore the tradition and history of the Commonwealth of Virginia with respect to its establishment and operation of schools, as well as hold invalid various enactments of the Legislature of Virginia structuring Virginia's system of free public schools" (A. 575; see also A. 570-71, 575-78). Notably, the tradition and history of Virginia have been to prefer school segregation to local school district autonomy, while preferring local school district autonomy to desegregation. (See pp.

up pursuant to state law establish the absolute, unbudgeable outer limits of federal-court desegregation decrees, except where the federal court can find as a fact that the drawing of the lines was racially "motivated," [76] or

---

5-14, *supra;* pp. 68-69, *infra*). And to break with this tradition by crossing school district lines for the purpose of desegregation, as the District Court did, does not require the invalidation of any Virginia statutes: it requires only recognition that, by reason of the Supremacy Clause, no Virginia statutes (whether or not they are otherwise valid) can confine the power of a federal court to "consider the use of all available techniques" for dismantling dual school systems, *Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 37 (1971). In this setting, the Fourth Circuit's invocation of Virginia tradition and law highlight the inflexible character of its Tenth Amendment holding.

Its second major way of asserting the inviolability of school district lines is to treat individual school districts, which concededly have long maintained the sort of dual school systems condemned by *Brown* (I), as becoming "unitary" and thus escaping the remedial powers of the federal courts under *Brown* (II), so soon as desegregation has been pursued to the fullest extent that it can be pursued within the separate boundaries of each district and without crossing district lines. (See A. 563, 564-65, 571-72, 580-81, 582-83.) Unless "there was ever joint interaction between any two of the units involved (or by higher state officers) for the purpose of keeping one unit relatively white by confining blacks to another" (A. 572), the units are to be viewed as watertight compartments for purposes of the application of both *Brown* (I) and *Brown* (II). (See A. 582-83.) The Fourth Circuit can find no such joint interaction in the case of Richmond, Chesterfield and Henrico (A. 572-74), in part because racial discrimination has been so pervasively practiced in all three that it could not have differentially driven blacks from one to the other (A. 573-74.)

Third, the Court of Appeals expresses concern over various practical problems that it perceives in the District Courts' inter-district desegregation plan (A. 566, 575-76,578-79), although it nowhere suggests that these problems approach the level of magnitude which would justify reversing a district judge's discretion under *Swann*. See 402 U.S., at 31. This is to say that the *Swann* principles are inapplicable across school district lines. See pp. 52-53 next following.

[76] "It is not contended . . . that the establishment of the school district lines more than 100 years ago was invidiously motivated. We have searched the 325-page opinion of the district court in vain for the slightest scintilla of evidence that the boundary lines of

"invidious," [77] or "intended" [78] or had the "purpose" [79] to segregate the public schools by race.

The precise nature of this holding appears starkly when the result that it ordains for Richmond-Chesterfield-Henrico is compared with the result approved for Charlotte-Mecklenburg by this Court in *Swann*.[80] If Virginia law had constituted Richmond and the two entirely surrounding counties as a single school district, in the way that North Carolina law includes the City of Charlotte and the County of Mecklenburg within a single district, there is not the faintest shadow of a doubt that the Fourth Circuit would have affirmed—and would have been required by *Swann* to affirm—the District Court's desegregation order here. This is to say that, notwithstanding the several different ways in which the Court of Appeals phrases its grounds for reversal,[81] each depends decisively upon the bedrock notion

---

the three local governmental units have been maintained either long ago or recently for the purpose of perpetuating racial discrimination in the public schools." (A. 571.)

[77] ". . . [I]t is not established that the racial composition of the schools in the City of Richmond and the counties is the result of invidious state action." (A. 582-83; see also the paragraph quoted in text on p. 46, *supra*.

[78] "The facts of this case do not establish . . . that state establishment and maintenance of school districts coterminous with the political subdivisions of the City of Richmond and the Counties . . . have been intended to circumvent any federally protected right." (A. 580.)

[79] "But neither the record nor the opinion of the district court even suggests that there was ever joint interaction between any two of the units involved (or by higher state officers) for the purpose of keeping one unit relatively white by confining blacks to another." (A. 572; see also note 76 *supra*.)

[80] *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) [hereafter sometimes cited as *Swann*].

[81] These various phrasings and their relevance to the critical holding of the Court of Appeals are analyzed in notes 72-75, *supra*.

that school district lines confine a State's constitutional obligation under *Brown* (I) and the federal courts' remedial powers under *Brown* (II) and *Swann*.

The Fourth Circuit does not and could not hold either (A) that the Virginia schools within the Richmond-Chesterfield-Henrico area, *viewed without regard to the lines that subdivide this area into three school "divisions,"* are unitary,[82] or (B) that Judge Merhige's plan for converting the schools within the Richmond-Chesterfield-Henrico area "to a unitary system in which racial discrimination would be eliminated root and branch" [83] was, *without regard to the lines that subdivide this area into three school "divisions,"* an abuse of the "equitable remedial discretion of the District Court" [84] whose "breadth and flexibility" were confirmed in *Swann*.[85] Rather, it holds precisely that, because of those "division" lines, the District Court was powerless[86] to enter a decree which would otherwise have been unassailably proper.

---

[82] The courts below and other lower courts use the term "unitary," as this Court did in *Green* v. *County School Bd.*, 391 U.S. 430, 438 (1968), and *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19, 20 (1969), to denote school systems that comply with the constitutional obligation of *Brown* (I).

[83] *Green* v. *County School Bd.*, 391 U.S. 430, 438 (1968).

[84] *Swann*, 402 U.S., at 25; see *id.*, at 15-16.

[85] 402 U.S., at 15; see *id.*, at 27.

[86] The Court of Appeals plainly did not hold merely that the location of school district lines was one important factor to be considered in devising the pupil-assignment phase of a desegregation plan, or that such lines should not be crossed without a finding their crossing was necessary for effective desegregation. Judge Merhige was palpably aware of both these points, and could not conceivably have been reversed on the theory that he ignored them. From first to last, the Fourth Circuit's opinion makes plain that it is concerned with the limits of power, not with those of discretion. (E.g., A. 562, 563, 579-83.)

There has been no blinking the consequences, as Mr. Justice Cadozo was wont to say. The Constitution may follow the flag, but not across a school district line. School district boundary lines, at least where they are not factually proved to have been drawn with racial discrimination in mind, fix categorically the outer limits of "the broad remedial powers of a court" [87] to desegregate the schools. The measure of a desegregation plan "is its effectiveness" [88] —right up to the school district line. At that point, its measure is the line, whether or not a single-district plan effectively desegregates. Because "[t]here is no universal answer to complex problems of desegregation," [89] federal district courts "may and should consider the use of all available techniques," [90] and the "flat" or the "absolute prohibition" of any useful technique is itself unconstitutional.[91] But these principles also run only to the school district line: federal equity is flatly and absolutely forbidden to cross that line itself.

B. *This Decision Critically Impairs the Powers of the Federal Courts to Do the Vital and Difficult Job of Desegregating the Schools of the Nation's Metropolitan Ghettos.*

The Fourth Circuit's categorical prohibition of desegregation orders crossing school district lines gravely imperils the ability of the federal courts to solve the country's most critical and intractable school desegregation problem: bringing *Brown* v. *Board of Education* to the metropolitan ghetto. The segregation and isolation of racially

[87] *Swann*, 402 U.S., at 27.

[88] *Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 37 (1971).

[89] *Green* v. *County School Bd.*, 391 U.S. 430, 430 (1968).

[90] *Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 37 (1971).

[91] *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 46 (1971).

identifiable center-city schools in metropolitan regions, which is not merely persisting but actually increasing under the shelter of the artificial lines of school district boundaries, presents the challenge of the 1970's to the vitality of *Brown* (I) and *Brown* (II). It prolongs and proliferates the evils that *Brown* condemned; and it will prove to be essentially insoluble so long as school district lines are treated as legally sacrosanct.

Over the past three decades and today, one of the most profound among the forces changing the contours of American society has been and is increasng urbanization. North and South, the greatest growths in population have come in areas surrounding cities. Large cities have grown more numerous and larger. In part this tendency is reflected by the consistent addition to the roster of the Bureau of the Census of new Standard Metropolitan Statistical Areas (SMSA's), defined as counties containing at least one city of 50,000 or more inhabitants, together with those adjacent counties that are metropolitan in character and are integrated economically and socially with the county of the central city.[92] In part, the tendency is marked by increases in the populations of existing SMSA's.

For no population group is this increasing urbanization more pronounced than for America's blacks.[93] The disintegration of the traditional Southern rural economy that began at the time of the Great Depression has resulted in one of the greatest population movements in history as displaced agricultural workers have sought relief from

[92] See UNITED STATES BUREAU OF THE BUDGET, OFFICE OF STATISTICAL STANDARDS, STANDARD METROPOLITAN STATISTICAL AREAS (1967), which sets forth and develops these criteria.

[93] NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT (G.P.O. 1968 0-291-729) (1968) [hereafter cited as KERNER COMMISSION], 115-121, 215-216.

economic privation in the more industrial urban centers. Twenty million Americans have left the land and moved to urban areas since 1940, "marking it as one of the greatest mass dislocations in United States history and making it comparable to the movement of twenty-two million immigrants to American shores between 1890 and 1930, a period of four decades." [94]

Black Americans, as the most marginal element in the rural economy, have been disproportionately represented in this great migration.[95] They are now "more urbanized, and more metropolitan, than the white population." [96] Within metropolitan regions, they tend to occupy the center cities, while the whites inhabit the suburbs.[97] Indeed, metropolitan center cities have seen a net white population loss.[98] Yet this latter phenomenon—sometimes spoken of as "white outflow" [99] or "white flight"—appears less important than differential racial immigration to the center city and the suburbs, respectively, in producing the increasing racial separation that is characteristic of the metropolis:

> . . . Between 1940 and 1960 the total population of metropolitan areas increased by 40 million persons. Eighty-four percent of the Negro increase occurred in the central cities and 80 percent of the white increase in the suburbs. Btween 1950 and 1960 the suburbaniza-

---

[94] Piven & Cloward, REGULATING THE POOR 214 (1971).

[95] *Ibid.*

[96] KERNER COMMISSION 118.

[97] *Id.*, at 118-120.

[98] *Ibid.*

[99] *Id.*, at 119.

tion of whites accelerated: nearly 90 percent of their metropolitan increase occurred in the suburbs.

. . .

School-age children in metropolitan areas also reflect these trends. Between 1950 and 1960, the school-age population of the Nation's 24 largest metropolitan areas—which today contain almost two-thirds of the Nation's urban school-age population—increased by 5 million. Almost 90 percent of the nonwhite increase occurred in the central cities; more than 80 percent of the white increase was in the suburbs. By 1960, four out of five nonwhite metropolitan children of school age lived in central cities, while nearly three-fifths of the white children lived in the suburbs.

. . .

The rich variety of the Nation's urban population is being separated into distinct groups, living increasingly in isolation from each other. In metropolitan areas there is a growing separation between the poor and the affluent, between the well educated and the poorly educated, between Negroes and Whites. The racial, economic and social stratification of cities and suburbs is reflected in similar stratification in city and suburban school districts.[100]

The Richmond SMSA, and the three units of that area which are the principals in this present case—the City of Richmond, Chesterfield County, and Henrico County—exemplify these demographic developments, as illustrated by the following table:

[100] 1 UNITED STATES COMMISSION ON CIVIL RIGHTS, REPORT: RACIAL ISOLATION IN THE PUBLIC SCHOOLS (G.P.O. 1967 0-243-637) 1967) [hereafter cited as Civil Rights Commission], 11-12, 17.

POPULATION WITHIN THE RICHMOND SMSA[101]

	1950		1960		1970	
	population	*% non-white*	*population*	*% non-white*	*population*	*% non-white*
Richmond	230,310	31.7	219,958	42.0	249,430[102]	42.4
Chesterfield	40,400	20.9	71,197	13.3	77,046[102]	11.5
Henrico	57,340	9.9	117,339	5.2	154,364	6.8

The same patterns appear in metropolitan areas across the Nation. Consider the 1960-1970 figures for the following SMSA's:

POPULATION CHANGE FOR WHITE AND BLACK POPULATION IN SELECTED METROPOLITAN AREAS OF 500,000 OR MORE, BY CENTRAL CITY AND RING—1960 TO 1970[103]

SMSA, central city and ring	*Percent of population white*		*Percent of population black*	
	1960	*1970*	*1960*	*1970*
NORTHERN CITIES				
New York	88.0	82.0	11.5	16.3
Central city	85.3	76.6	14.0	21.2
Suburbs	95.0	93.6	4.8	5.9
Detroit, Mich.	84.9	81.4	14.9	18.0
Central city	70.8	55.5	28.9	43.7
Suburbs	96.2	96.0	3.7	3.6

[101] Sources: UNITED STATES DEPT. OF COMMERCE, BUREAU OF THE CENSUS, II CENSUS OF POPULATION: 1950 (G.P.O. 1952), 46-29, 46-30; UNITED STATES DEPT. OF COMMERCE, BUREAU OF THE CENSUS, I CENSUS OF POPULATION: 1960 (G.P.O. 1961), 48-28; UNITED STATES DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CENSUS OF POPULATION: 1970 (G.P.O. PC (1)-B48, Oct. 1971), 48-42 (correction page), 48-44.

[102] The Richmond and Chesterfield figures for 1970 are affected by Richmond's annexation, on January 1, 1970, of an area of Chesterfield County containing 47,262 persons, 97% white. Without that annexation, the differential population growth and racial change trends shown by the table would be even more marked.

[103] *Hearings Before the Senate Select Committee on Equal Educational Opportunity, 92nd Cong., 1st Sess., on Equal Educational Opportunity, Part 21,* Metropolitan Aspects of Educational Inequality (Nov. 22, 23, 30, 1971), 10913.

COPY BOUND CLO

SMSA, central city and ring	*Percent of population white*		*Percent of population black*	
	1960	*1970*	*1960*	*1970*
NORTHERN CITIES				
Chicago, Ill.	85.2	81.3	14.3	17.6
Central city	76.4	65.6	22.9	32.7
Suburbs	96.9	96.0	2.9	3.5
Philadelphia, Pa.	84.3	81.9	15.5	17.5
Central city	73.2	65.6	26.4	33.6
Suburbs	93.8	92.9	6.1	6.6
San Francisco-Oakland, Calif.	87.5	82.8	8.5	10.6
San Francisco	79.0	74.1	10.0	13.4
Oakland		59.1	22.8	34.5
Suburbs	93.7	91.0	4.4	5.4
Baltimore, Md.	78.3	75.8	21.4	23.7
Central city	65.1	53.0	34.7	46.4
Suburbs	92.8	93.5	7.0	6.0
Washington, D.C.	75.5	74.3	23.9	24.6
Central city	45.6	27.6	53.9	71.1
Suburbs	93.3	91.0	6.3	7.9
SOUTHERN CITIES				
Atlanta, Ga.	77.2	77.4	22.8	22.3
Central city	61.8	48.5	38.3	51.3
Suburbs	91.3	93.6	8.5	6.2
Houston, Tex.	80.3	79.9	19.5	19.3
Central city	76.9	73.3	22.9	25.7
Suburbs	86.9	90.7	12.9	8.8
New Orleans, La.	69.1	68.6	30.6	31.0
Central city	62.6	54.5	37.2	45.0
Suburbs	83.9	87.2	15.9	12.5

These raw population figures, moreover, significantly underreport the percentages of black students in the center-city metropolitan schools. Black school population ratios consistently run ahead of black total population ratios for several reasons: the fact that the black population is relatively younger than the white, and has more school-age children;[104] the fact that whites, far more frequently than

[104] KERNER COMMISSION 240.

blacks, can afford and choose private schools;[165] and the fact that "[p]eople gravitate toward school facilities"[166] to the extent that they are mobile, so that many middle-class whites who have or expect children gravitate toward the suburban schools.[167] Thus, Richmond's public school population was 69 percent black in 1971 (A. 521; 338 F. Supp., at 231); and blacks comprise the following percentages of the public school population, according to the latest available figures, in the several SMSA's whose total black-white population ratios are set forth immediately above: New York, 34.5%; Detroit, 63.8%; Chicago, 54.8%; Philadelphia, 60.5%; San Francisco, 28.5%; Oakland, 56.9%; Baltimore, 67.1%; Washington, D.C., 94.6%; Atlanta, 68.7%; Houston, 35.6%; New Orleans, 69.5%.[168]

Thus, a considerable number of our great central cities are increasingly becoming black enclaves, readily identifiable as such, surrounded by white suburbs. It is impossible to say, of course, without detailed judicial investigation, how many of these cities represent dual school systems within the prohibition of *Brown* (I).[169] Nonetheless, the

---

[165] *Id.*, at 237.

[166] *Swann*, 402 U.S., at 20.

[167] KERNER COMMISSION 119.

[168] These figures, compiled by the Department of Health, Education and Welfare, appear in 117 Cong. Rec. S17516-S17518 (daily ed., Nov. 3, 1971).

[169] After suggesting that "the root causes of the concentration of blacks in the inner cities of America are simply not known" (A. 574-75), the Court of Appeals below speculated that "the forces influencing demographic patterns in New York, Chicago, Detroit, Los Angeles, Atlanta and other metropolitan areas have operated in the same way in the Richmond metropolitan area to produce the same result. . . . Whatever the basic causes, it has not been school assignments, and school assignments cannot reverse the trend." (A. 575.) Cases coming from these other cities, we respectfully suggest, must await examination on their own records. But it is interesting to note that, insofar as the cities mentioned have come

COPY BOUND CL

total number of black children consigned to schooling in racially identifiable schools within such systems today, and who therefore face a future of unconstitutional segregated education isolated from their white suburban counterparts, must be of enormous magnitude by any calculation.

If all of these children were so fortunate as to live in cities which, by the happenstance of state law, were organized together with their white surrounding metropolitan suburbs into single school districts, they should yet have the benefits of *Brown*. This is exactly what *Swann* v. *Charlotte-Mecklenburg Board of Education* promises. But, unlike Charlotte-Mecklenburg, many metropolitan areas do not constitute single school districts. To the contrary, the 227 SMSA's recognized in the United States as of 1967[110] had among them 5018 separate, independent school districts, in addition to 511 dependent school systems, an average of more than twenty-five apiece.[111] This total, it is true, has been sharply decreasing[112] as more and more metropolitan entities recognize the educational advantages of consolidation. Not the least pernicious feature of the Court

---

under careful judicial scrutiny, courts conversant with the relevant facts have found unconstitutional school segregation. *United States* v. *School District No. 151*, 286 F. Supp. 786 (N.D. Ill. 1968), *aff'd*, 404 F.2d 1125 (7th Cir. 1968), *on remand*, 301 Supp. 201 (N.D. Ill. 1968) (area of Chicago SMSA); *Bradley* v. *Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971), *subsequent history*, see n. 122, *infra* (Detroit); *Crawford* v. *Board of Education*, Super. Ct., L.A. Cty., No. 822-854, opinion of February 11, 1970 (Los Angeles) (appeal pending); *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501 (C.D. Cal. 1970), *order denying intervention of additional parties aff'd*, 427 F.2d 1352 (9th Cir. 1970) (area of Los Angeles (SMSA); *e.g.*, *Calhoun* v. *Cook*, 451 F.2d 583 (5th Cir. 1971) (Atlanta).

[110] This excludes the SMSA's of Puerto Rico but includes Hawaii's.

[111] UNITED STATES DEPT. OF COMMERCE, BUREAU OF THE CENSUS, 5 CENSUS OF GOVERNMENTS: 1967 (1968), 1.

[112] *Ibid.*

SE IN CENTER

of Appeals' decision below is the incentive that it offers to the suburbs to resist this development.

In the context of American urban living patterns as they now are and are increasingly becoming—of our black cities and our white suburbs—school district lines frequently function as walls of separation of the races. Their contribution to black isolation in the center city metropolitan schools has been recognized;[112] and some at least of these metropolitan school systems "appear to be completely b ond hope of meaningful desegregation, absent some dramatic change in their boundaries."[114] This is certainly not to say that, in every multi-district metropolitan region where unconstitutional racial segregation is judicially found to be persisting in violation of *Brown* (I), a desegregation plan that crosses the district lines—still less, any particular form of inter-district desegregation plan—should be required. It is to say that, in such areas, inter-district plans must be among the "available techniques"[115] that the federal district courts can consider in the exercise of their discretion, if they are to meet the obligation of *Brown* (II) and *Swann* to devise desegregation decrees that will "work"[116] in the Nation's cities.

By categorically denying federal judicial power to cross school district lines, even where the most compelling needs and "practicalities"[117] of desegregation make that course necessary and proper, the Fourth Circuit's judgment here

---

[112] Civil Rights Commission 17-18.

[114] *United States* v. *Board of School Commissioners*, 332 F. Supp. 655, 677 (S.D. Ind. 1971).

[115] *Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 37 (1971); see also *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 46 (1971).

[116] *Green* v. *County School Board*, 391 U.S. 430, 439 (1968).

[117] *Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 37 (1971).

equally categorically denies the hope of *Brown* to the black children of "these cities, [where] solutions not involving suburban participation no longer are possible." [118] That is a tragic enough result, but far more tragic in its consequences: the acceleration of the movement deplored by the Kerner Commission, "toward two societies, one black, one white—separate and unequal." [119, 120]

---

[118] CIVIL RIGHTS COMMISSION 154.

[119] KERNER COMMISSION 1.

[120] We need hardly add that, although its implications are nationwide, a rule fixing territorial limits to *Brown* will provide especial comfort in those States and cities where, during eighteen years, every conceivable device of "[d]eliberate resistance" and "dilatory tactics," *Swann*, 402 U.S., at 13, has been opposed to desegregation with seemingly tireless energy. By promising whites safe haven behind school district lines, the Fourth Circuit's decision will unquestionably encourage them to seek such havens out and, once there, to employ every public and private means at their disposal to keep them as white as possible. Some of these means (such as rejection of school district consolidation proposals, of public housing projects, of zoning variances for uses threatening to attract black employees) are essentially undetectable; others (such as inflation of property values by the premium paid to purchase the assurance of all-white schools) are innately uncorrectable; still others (such as intimidation of prospective black occupants) are correctable in theory but not in fact. It is one thing, as this Court said in *Swann*, 402 U.S., at 22, not to load a school case with more baggage than it can carry; but it is quite another, as the Fourth Circuit has done here, in deciding a school case, to throw the baggage out in the road where it will foreseeably cause these sorts of "accidents."

II.

Questions Raised by the Fourth Circuit's Decision Require Authoritative Resolution By This Court, for the Guidance of the Lower Courts in Numerous Cases.

A. *The Decision Conflicts With Decisions in Other Circuits.*

The Fourth Circuit's holding that federal desegregation decrees may not cross school district boundary lines, absent a showing that the lines were drawn for discriminatory motives, conflicts with decisions of the Fifth Circuit[121] and of a district court in the Sixth,[122] and is inconsistent, at the least, with the approach taken to a multi-district case by the

---

[121] In *Calhoun* v. *Cook*, 332 F. Supp. 804 (N.D. Ga. 1971), the district court made slight amendments to earlier orders that had been put into effect regarding the Atlanta school system, and then provided that, after six months, a final order would enter declaring the Atlanta system unitary and dismissing the lawsuit. In a "Comment," it suggested that school officials and others might well undertake voluntarily to investigate the possibility of consolidating the Atlanta school system with that of surrounding Fulton County. *Id.*, at 809-810. On appeal taken by the plaintiffs, the Fifth Circuit reversed and ordered, *inter alia*, that the district court "consider and make supplementary findings of fact and conclusions of law on the wide range reevaluation of the Atlanta school system described in the . . . 'Comment'." *Calhoun* v. *Cook*, 451 F.2d 583 (5th Cir. 1971).

[122] Following its opinion in *Bradley* v. *Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971), the district court held extended hearings upon the legality and propriety of its granting relief that extended beyond the confines of the Detroit school district. By opinions and orders of March 24 and 28, June 14 and July 11, 1972, it concluded that inter-district relief in the form of a Detroit-area metropolitan plan was lawful and appropriate, and it decreed such a plan. *Bradley* v. *Milliken*, U.S.D.C., E.D. Mich., C.A. No. 35257. The defendants have appealed, and the appeal is presently pending *sub nom. Bradley* v. *Milliken*, 6th Cir., No. 72-8002. Oral argument has been had, and the case is submitted for decision.

Eighth Circuit.[123] Its discovery that the Tenth Amendment constitutes an outright bar against the prudential use of school district consolidation as a desegregation tool casts into doubt, more generally, the developing line of cases that have found no such doctrinal impediment to ordering consolidation where factually appropriate in a variety of situations.[124]

B. *The Decision Has Immediate Implications for the Efficient Conduct of Litigation Pending in Seven Circuits.*

The impact of a decision which curtails this developing body of remedial law in the abrupt fashion of the Fourth Circuit here will be both widespread and immediate. School cases seeking metropolitan desegregation by means of multi-district plans are presently pending in the district courts of at least six circuits in addition to the Fourth: hearings on metropolitan-area relief have been ordered in Indianap-

---

[123] The extent to which the decision below conflicts with *Haney* v. *County Bd. of Educ.*, 410 F.2d 920 (8th Cir. 1969), *subsequent history in* 429 F.2d 364 (8th Cir. 1970), depends upon the meaning of the "invidious motivation" test coined by the Fourth Circuit. Whether or not it would reach the facts of *Haney* is uncertain. What is certain is that the Eighth Circuit itself eschewed a test of "intentional gerrymandering of district lines for racial reasons," 410 F.2d, at 924, which is apparently what the Fourth Circuit's test amounts to.

[124] *Taylor* v. *Coahoma County School Dist.*, 330 F. Supp. 174 (N.D. Miss. 1970-1971), *aff'd*, 444 F.2d 221 (5th Cir. 1971); *United States* v. *Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), 330 F. Supp. 235 (E.D. Tex. 1971), *modified and aff'd*, 447 F.2d 441 (5th Cir. 1971); *Lee* v. *Macon County Bd. of Educ.*, 448 F.2d 746 (5th Cir. 1971), 455 F.2d 978 (5th Cir. 1972). Pairing of schools across school district lines was also ordered in *Robinson* v. *Shelby County Bd. of Educ.*, 330 F. Supp. 837 (W.D. Tenn. 1971), *order aff'd*, 6th Cir., No. 71-1966 (Sept. 21, 1972).

olis,[125] and complaints seeking such relief are under consideration in numerous other cities.[126] If the Fourth Circuit decision below is correct, these litigations should be radically reshaped: if it is incorrect, they should be taken out of its shadow; and, in either event, they should not be confused and delayed by disputes about its correctness and meaning which this Court could authoritatively set to rest.

Metropolitan desegregation, long overdue, is now proceeding apace. But following the decision below, its effective progress urgently requires guidance that only this Court can provide.

---

[125] *United States* v. *Board of School Comm'rs*, 332 F. Supp. 655 (S.D. Ind. 1971), *mandamus denied*, 7th Cir., No. 72-1063 (Feb. 2, 1972), *cert. denied*, 32 L.ed.2d 805 (1972).

[126] *E.g.*, *Morgan* v. *Hennigan*, D. Mass., Civ. No. 72-911-G (Boston); *Lumpkin* v. *Dempsey*, D. Conn., Civ. No. 13,716 (Hartford) (motion to dismiss denied by order of January 22, 1971, Smith, C.J., and Blumenfeld and Clairie, JJ.); *Arthur* v. *Nyquist*, W.D. N.Y., Civ. No. 1972-325 (Buffalo); *Evans* v. *Buchanan*, D. Del., Civ. No. 1816 (Wilmington); *Wheeler* v. *Durham City Bd. of Educ.*, M.D.N.C., Civ. No. C-54-D-60 (Durham); *Calhoun* v. *Cook*, N.D. Ga., Civ. No. 6298 (Atlanta) (supplemental and amended complaint seeking metropolitan relief filed after remand by the Fifth Circuit, note 121 *supra*); *Haycraft* v. *Bd. of Educ.*, W.D. Ky., Civ. No. 7291-G (Louisville); *Higgins* v. *Grand Rapids Bd. of Educ.*, W.D. Mich., Civ. No. 6389 (Grand Rapids); *Brinkman* v. *Gilligan*, S.D. Ohio, Civ. No. 72-137 (Dayton). See generally *Note, Merging Urban and Suburban School Systems*, 60 GEO. L. J. 1279 (1972).

III.

This Case Presents an Excellent Opportunity for the Court to Consider, and to Guide the Lower Courts in Consideration of, the Question of Multi-District Desegregation Decrees in the Metropolitan Context.

Several features make this Richmond case especially opportune as a vehicle for the Court's initial consideration of the propriety of multi-district metropolitan desegregation plans. The Fourth Circuit's decision turns upon a sharply focused issue of constitutional law, unobscured by significant factual controversies or by debatable judgments relating to the exercise of equitable discretion under *Swann* and the scope of its appellate review. (Part I(A), *supra.*) The legal issue is pivotal: it emerges against the background of the familiar history of public school segregation in Virginia with which this Court has dealt many times between *Brown* (I) and *Wright* v. *Council of the City of Emporia*,[127] and it stands at the threshold of the problems of effective metropolitan desegregation. Its resolution in this case is not complicated by state-law problems, since Virginia law provides all the means of implementation of the inter-district plan decreed by the District Court. (A. 195, 538-40; 338 F. Supp. at 84, 245-246.)[128] Nor is it compli-

---

[127] 33 L.ed.2d 51 (1972). See note 2 *supra.*

[128] The Court of Appeals is simply wrong that "[t]o approve the consolidation of these three school districts would require us to . . . hold invalid various enactments of the Legislature of Virginia structuring Virginia's system of free public schools" (A. 575). The consolidation ordered by the District Court is entirely consonant with Virginia law allowing and providing detailed mechanisms for the consolidation of school districts, except on one single point. That point is the provision of Va. Code §22-30, "enacted since the joinder of state and county defendants in this case" (A. 228; 338 F. Supp., at 99), which prohibits the State Board of Education

cated by the presence of an excessive number of school districts: only three are involved.

It is no accident, moreover, that the Fourth Circuit laid its decision upon the broad legal ground of the Tenth Amendment. For if federal judicial power to cross school district lines in fashioning desegregation decrees exists in any situation short of active, "intentional gerry-mandering of district lines for racial reasons," [129] the Richmond Virginia situation presents an extreme case calling for the exercise of that power. This is so for several reasons:

(A) As we have pointed out at pp. 5-13, 20, *supra*, Virginia's school district lines which are now erected as insurmountable barriers against desegregation have historically "been ignored when necessary to serve public educational policies, including segregation." (A. 257; 338 F. Supp., at 113; see also A. 193, 231, 352-64; 338 F. Supp., at 83, 100, 155-161.) They "have never been obstacles for the travel of pupils under various schemes, some of them centrally administered, some of them overtly intended to promote the dual system." (A. 193; 338 F. Supp., at 83.)

---

from creating school districts composed of more than a single city or county without consent of the local school boards and governing bodies. This provision does not oppose any obstacle to the District Court's decree except the obstacle that is instinct in any situation where a judicial decree is called for—the unwillingness of the party against whom the decree runs to do what it compels without its compulsion. It need not be held "invalid" for the obvious reason that, whether valid or invalid, it cannot trammel the power of a federal court of equity, see, e.g., *Haney* v. *County Bd. of Educ.*, 429 F.2d 364, 368-369 (8th Cir. 1970); but to the extent that this latter proposition amounts to a narrow ground of "invalidation" of the provision as applied under the Supremacy Clause, that is no novel or troublesome result. *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43 (1971).

[129] *Haney* v. *County Bd. of Educ.*, 410 F.2d 920, 924 (8th Cir. 1969).

Not only have children been assigned to schools across those lines—most notably, black children sent to black schools pursuant to the policy of *apartheid*—(*ibid.*), but the entire structure of local school-district autonomy was promptly scrapped in the first throes of Virigina's massive resistance to *Brown* (I), and thereafter reassumed subject to various segregatory exceptions such as tuition grants (see pp. 6-13, *supra;* A. 194, 212-20, 271-81, 313-31; 338 F. Supp., at 84, 92-95, 119-123, 138-146). Apart from the obvious point that "[b]arriers which did not prevent enforced segregation in the past [should] . . . not be held to prevent conversion to a full unitary sustem," [130] this history amply supports the District Court's finding that the present resistance to an inter-district desegregation plan has little to do with concerns about local government, but is "racially based." [131]

(B) Both courts below were thoroughly agreed that within the school district boundary lines of the City of Richmond, nothing more can be done than has already been done to "disestablish . . . the formerly state-imposed dual school system." (A. 563.) This finding is at once the basis upon which the District Court concluded that a metropolitan school desegregation plan was factually neces-

---

[130] *Henry* v. *Clarksdale Municipal Separate School Dist.*, 433 F.2d 387, 394 (5th Cir. 1970).

[131] "Considering the historic flexibility of political subdivisions in the state and in this area in matters of pupil exchange across political boundaries and in the cooperative operation of other public utilities, in view of the several statutory patterns—part of the public policy of the state—under which cooperative ventures can be undertaken, and in view of the fact that school operation in the counties has always entailed transportation times and distances similar to those involved in the suggested metropolitan plan, resistance to the proposal appears clearly to be racially based." (A. 231; 338 F. Supp., at 100.)

sary,[132] and the basis upon which the Court of Appeals conversely concluded that the Richmond school system was legally "unitary" (A. 563, 571-72). But it is also undisputed and indisputable that this "unitary" system consists of a black island in a white sea. (See pp. 34-35, *supra*.) Richmond, containing a school population that is 69% black[133] (with one-fifth of its schools ranging from 80% to 89% black) (A. 530-32; 338 F. Supp., at 240-242), is entirely surrounded by two counties whose school population is 91% white.[134] As between Richmond and the counties, "great disparities in 1971 racial composition . . . [make] both individual facilities and entire systems racially identifiable." (A. 186; 338 F. Supp., at 80.)

Black Richmond schools and white county school lie virtually on top of one another. Richmond's 78% black John Marshall High School is 1.4 miles (eight blocks) from the 96.1% white Henrico High School; Richmond's 85% black Highland Park School is 1.3 miles from Henrico's 99.8% white Glen Lea School; and the District Court's opinion identifies nine other "schools of extremely divergent racial composition . . . located a very short distance apart" (A. 428; 338 F. Supp., at 190) across the school district lines. It is little wonder that an expert witness for the county and state defendants "conceded that a child, observ-

---

[132] ". . . [T]he 'desegregation' of schools within the city and the counties separately is pathetically incomplete. Not only is the elimination of racially identifiable facilities impossible of attainment, but the partial efforts taken contain the seeds of their own frustration." (A. 237; 338 F. Supp., at 103; see also, A. 230; 338 F. Supp., at 100.)

[133] For the 1971-1972 school year, 13,500 white students and 29,747 black students were enrolled in the Richmond schools. (A. 417; 338 F. Supp., at 185.)

[134] In 1971-1972, Henrico enrolled 31,299 white students and 3,018 black students, while Chesterfield enrolled 21,588 white students and 2,166 black students. (A. 417-18; 338 F. Supp., at 185.)

ng two schools on different sides of a jurisdictional boundary, with widely disparate racial compositions, would not be sufficiently sophisticated to know most of the forces and factors which brought forth such racial composition, but would simply perceive the existence of black and white schools." (A. 451; 338 F. Supp., at 200.)

In addition, the black Richmond schools are growing blacker: during the 1970-71 and 1971-72 sessions, "Richmond schools lost over 7,800 white students from their projected figure [i.e., the figure envisaged in the District Court's interim Richmond-only desegregation plan]" (A. 417; 338 F. Supp., at 185). This loss of "39% of its white students in the past two years" (A. 237; 338 F. Supp., at 203), was a significant consideration in the District Judge's finding that any attempts to desegregate Richmond schools within the closed confines of the Richmond school district would "contain the seeds of their own frustration" (see note 132, *supra*).

(C) The Greater Richmond region is the archetype of a metropolitan area wherein school district boundary lines coincide with no tangible obstacles and are unrelated to any administrative or educational needs" (A. 193; 338 F. Supp., at 83). The District Court's opinion makes detailed findings of fact about the region (A. 401-16; 338 F. Supp., at 178-184) which compel the conclusion—unquestioned by the Court of Appeals—that the City of Richmond and its two surrounding counties are entirely integrated in every dimension but race. (See pp. 15-18, *supra*.)

We have previously mentioned the measure of integration used by the Census Bureau in its definition of Standard Metropolitan Statistical Areas.[135] For that purpose, a county would be regarded as integrated with a central city

[135] See text at note 92 *supra*.

N CENTER

if 15% of the workers living in the county worked in the city.[126] By contrast, 48% of Chesterfield's almost 30,000 workers work in Richmond, 30% work in their home county, 6% work in Henrico. Among Henrico's nearly 70,000 workers, 65% work in Richmond, 27% work at home, 3% work in Chesterfield.[127]

Richmond is a magnet for the counties' shoppers as well as its workers. The city's total population is 249,430; Chesterfield's is 77,046; Henrico's is 154,364.[128] But Richmond is responsible for $698,123,000 in retail trade as compared to $89,226,000 in Chesterfield and $186,021,000 in Henrico. The disposition is even sharper in regard to "shopping goods"—those purchased from department and apparel stores and thus comprising routine consumer items. Richmond accounts for $213,671,000 of such purchases, five times the amount of Henrico's $39,253,000 and almost seventeen times Chesterfield's $12,704,000.[129]

Newspapers are a good index of the independent identity of subparts of a region, because they are relatively inexpensive to establish (less expensive, for example, than

---

[126] *Op. cit. supra*, note 92, at 2. This is an application rather than a paraphrase of the Census Bureau's definition.

[127] UNITED STATES DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CENSUS TRACTS, CENSUS OF POPULATION AND HOUSING, *Richmond, Va., SMSA* (PHC(1)-173) (1972), P-11, Table P-2, Social Characteristics of the Population: 1970) (these figures omit workers whose place of work is unreported). Throughout this section of the Petition, we shall use the latest figures available from judicially noticeable sources. They update the figures available at the time of trial (set forth at pp. 16-17, *supra*), and have the added virtue that they were compiled following the 1970 annexation of a portion of Chesterfield County by the City of Richmond (note 102, *supra*; see A. 406-10; 338 F. Supp., at 180-182).

[128] See chart at note 101, *supra*.

[129] RAND, MCNALLY & CO., [1972] COMMERCIAL ATLAS & MARKETING GUIDE 76. Compare A. 402, 411; 338 F. Supp., at 178, 182.

COPY BOUND CLO

television stations—all six of which in the Richmond SMSA are located in Richmond City), and are directly responsive to the demand of the local populace for news about their neighbors, about local political issues, and about the doings in the community as that is perceived by its inhabitants. Henrico County apparently has no newspapers; Chesterfield has only one: —a weekly published in Chester, which is a town of about 5,500 residents. The Richmond newspapers therefore serve the counties. There are an estimated 83,100 households in Richmond City, and 74,200 in the counties;[140] Richmond's morning *Times-Dispatch* has a daily circulation of 140,618 and a Sunday circulation of 193,540; Richmond's evening *News-Leader* has a circulation of 118,410.[141]

In addition, of the eighteen hospitals in the area, seventeen are located in Richmond. The principal cultural centers—libraries, museums, colleges—are located in Richmond. Public transportation is deployed, for the most part, to service city-county travel rather than intra-county travel.[142]

The pattern of life in the area, the context within which the public schools are seen as racially identifiable or not, is therefore this: Residents of Chesterfield and Henrico Counties—together with those of the City of Richmond—are generally born in Richmond; they shop in Richmond; they travel to Richmond for intellectual and cultural stimulation; they depend upon the Richmond papers for their "local" news; they work in Richmond (more than in their counties of residence); and, assuming that death occurs in a hospital, they die in Richmond. But they do not go to

---

[140] *Op. cit. supra*, note 77, at 76 (estimated as of January 1, 1972).

[141] [1972] AYER DIRECTORY OF PUBLICATIONS 1084, 1122.

[142] See note 28, *supra*.

OSE IN CENTER

school with Richmond's blacks. The black Richmond child who (according to defendants' expert witness) lacks the sophistication to perceive why this is so may perhaps be forgiven his unperceptiveness. What he fails to see has all the transparency of the Emperor's clothes.

IV.

The Fourth Circuit's Decision Departs From Settled Principles and Calls Into Question Doctrines That Are Indispensable Safeguards of the Right of Racial Equality.

In its result and its reasoning, the decision below constitutes a dangerous departure from essential substantive and remedial principles developed by this Court to protect the constitutional right of racial equality.

A. *The Decision, Focusing Only Upon Individual School Districts, Ignores the Affirmative Obligation of the State to Comply With the Commands of the Fourteenth Amendment and of* Brown v. Board of Education.

The Fourth Circuit comes at this case as though the Fourteenth Amendment and *Brown* (I) spoke severally to the individual school districts in the State of Virginia, rather than to the State itself. Conceding that each of the districts of Richmond, Chesterfield and Henrico long maintained dual school systems, it inquires whether each has made its separate peace with the Constitution. Because each has done all that it can do within its own boundaries, the Constitution is satisfied. Schools that were built to be or became black schools before *Brown* and during seventeen years of recalcitrance thereafter may remain black schools; previously white schools may remain white schools; so long as the black schools and the white schools are a mile and a half apart on either side of a school district line,

COPY BOUND CL

no one is responsible. The State of Virginia is not responsible, because—having chosen to assert its prerogative powers only in support of segregation (see pp. 6-14, *supra*) —it now chooses to take no further action.

This view, we think, cannot be squared with authority or reason, with the premises of the Fourteenth Amendment or the promises of *Brown*. To be sure, the named party-defendants in the *Brown* cases were local school systems within the States of Virginia, Kansas, South Carolina and Delaware; but they were not constitutional independent contractors. Each was operating its schools under the segregatory compulsion of state law, and the meaning of *Brown* (I) was to declare those state laws—and every aspect of the dual systems emanating from them—unconstitutional. As Judge Wisdom put it in *United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d 836, 847 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967): "The two Brown decisions . . . compelled seventeen states, which by law had segregated public schools, to take affirmative action to reorganize their schools into a unitary, non-racial system." If the *Brown* decisions themselves left any doubt of this, *Cooper* v. *Aaron*, 358 U.S. 1 (1958), did not. "State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system." *Id.*, at 7.

Two principles are essential here. The first is that "[t]he fundamental guarantee of equal treatment at the hands of the State cannot be thwarted by the fragmentation of decisionmaking." [143] "The United States Constitution recognizes no governing unit except the federal government

[143] Brief for the United States as *Amicus Curiae*, in *Griffin* v. *County School Bd.*, 377 U.S. 218 (1964) (O.T. 1963, No. 592), p. 20.

LOSE IN CENTER

and the state." [144] For the long-time growth of racially identifiable black schools within the City of Richmond, it is the State of Virginia, not Richmond alone, that must answer to the Constitution. And its answer cannot be that Richmond is an island, any more than that Prince Edward County[145] or Emporia[146] was.

The second principle is that "[t]he affirmative obligation to seek means of disestablishing state-imposed segregation must be shared by all agencies, or agents of the state . . . who are charged by law with, and who exercise, official public school functions." [147] That principle unquestionably reaches both the state and the county defendants here. For many years, they had been participants in the dual system that the District Court sought to end. If affirmative acts, the discharge of affirmative obligations, was necessary by them to disestablish the dual system, the District Court could command them to act.

The Fourth Circuit ignores these principles when it rules that a school district which "belatedly . . . has . . . done all it can to disestablish to the maximum extent possible the formerly state-imposed dual school system within its municipal boundary" thereby becomes "unitary." (A. 563.) This conception supposes, as Judge Winter's dissent below

---

[144] *Hall* v. *St. Helena Parish School Bd.*, 197 F. Supp. 649, 658 (E.D. La. 1961) (three-judge court), *aff'd*, 368 U.S. 515 (1962).

[145] *Griffin* v. *County School Bd.*, 377 U.S. 218 (1964).

[146] *Wright* v. *Council of the City of Emporia*, 33 L.ed.2d 51 (1972).

[147] *Franklin* v. *Quitman County Bd. of Educ.*, 288 F. Supp. 509, 519 (N.D. Miss. 1968). *Accord: Lee* v. *Macon County Bd. of Educ.*, 267 F. Supp. 458, 478-479 (M.D. Ala. 1967) (three judge court), *aff'd sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967); *United States* v. *Texas*, 321 F. Supp. 1043, 1056-1057 (E.D. Tex. 1970), 330 F. Supp. 235 (E.D. Tex. 1971), *modified and aff'd*, 447 F.2d 441 (5th Cir. 1971).

COPY BOUND CLOS

puts it, that "each political subdivision is free to operate in its own orbit" (A. 595); that neither is a school district obliged to look beyond its own boundaries for available and practicable desegregation techniques, nor is the State obliged to assist it to find them. We suggest, however, that *Brown* clearly implies such obligations.

Within a district, the obligation of *Brown* is to "consider the use of all available techniques including restructuring of attendance zones," with a view to "effectiveness" and to "the greatest possible degree of actual desegregation, taking into account the practicalities of the situation."[148] The practicalities may differ when the district line is reached, but not the obligation to consider them. Maximum feasible desegregation remains the objective, and the State remains constitutionally bound to seek it. Especially where state law and practice provide mechanisms for the ready effectuation of inter-district plans, it would be an unwarranted limitation upon *Brown* to say that they need never be considered. In Virginia, with its history of the use of inter-district mechanisms for the purposes of segregation, it would be a travesty.

B. *The Court's Extension of the Tenth Amendment Into Conflict With the Fourteenth Disturbs Established Law.*

The extent to which decision below rests upon the Tenth Amendment is not clear. The Amendment figures prominently in the opinion (A. 563, 579-80) and is said to reserve to the States "the power to structure their internal government" (A. 579). That power is described as absolute (*ibid.*); but then it is recognized as subject to being overridden by the Fourteenth when "'used as an instrument for circumventing'" Fourteenth Amendment rights (A. 580). In this case, the majority concludes that it was not

[148] *Swann*, 402 U.S., at 37.

E IN CENTER

so used, because the maintenance of school district lines does not appear to "have been intended to circumvent any federally protected right" (*ibid.*). It is then said that no federally protected rights were in fact denied (*ibid.*).

Perhaps the primary role of the Tenth Amendment here, as the Court of Appeals saw it, was to endow state political arrangements (specifically, school district lines) with a greater degree of immunity against federal judicial review than other forms of state action. Such an attitude of heightened deference, or "hands off," could account for the court's insistence that invidious motivation be shown before district boundaries may be disregarded in the fashioning of a desegregation plan. We shall discuss the "invidious motivation" requirement generally in Subpart IV(C) next following. For present purposes, it suffices to note that, insofar as the requirement was thought by the Court of Appeals to derive from the Tenth Amendment reserved power of the States in regard to their internal government structures, it is inconsistent with settled law.[149]

Indeed, the Tenth Amendment plainly has no proper place in the case at all. The doctrine of *Hunter* v. *Pittsburgh*, which the Court of Appeals cites as confirming the

---

[149] *E.g.*, *Baker* v. *Carr*, 369 U.S. 186 (1962) (invalidating 60-year-old legislative apportionment rendered unconstitutional by demographic changes). See particularly *Graham* v. *Folsom*, 200 U.S. 248 (1906):

> "The power of the State to alter or destroy its corporations is not greater than the power of the State to repeal its legislation. Exercise of the latter power has been repeatedly held to be ineffectual to impair the obligation of a contract. The repeal of a law may be more readily undertaken than the abolition of townships or the change of their boundaries or the boundaries of counties. The latter may put on the form of a different purpose than the violation of a contract. But courts cannot permit themselves to be deceived. They will not inquire too closely into the motives of the State, but they will not ignore the effect of its action." (*Id.*, at 253.)

COPY BOUND CL

"absolute discretion" of a State with regard to its municipal corporations,[150] does not speak to situations in which the consequences of the exercise of that discretion collide with federally guaranteed rights. The law of this Court governing such collisions has been settled for 100 years,[151] and state power over the organization and structure of political subdivisions has been consistently subordinated to "the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed." [152] Neither this Court[153] nor the lower courts[154] have therefore seen a Tenth Amendment problem in altering the structure or the boundaries of state school districts where necessary and proper to enforce the rights of black school children to a desegregated education.

> "State legislative district lines, congressional districts and other state political subdivisions have long ago lost their mastery over the more desired effect of protecting the equal rights of all citizens. . . . Political subdivisions of the state are mere lines of convenience for exercising divided governmental responsibilities. They cannot serve to deny federal rights." [155]

---

[150] *Hunter* v. *Pittsburgh*, 207 U.S. 161, 198 (1907), cited at A. 579.

[151] *Broughton* v. *Pensacola*, 93 U.S. 266 (1876); *Mount Pleasant* v. *Beckwith*, 100 U.S. 514 (1879); *Mobile* v. *Watson*, 116 U.S. 289 (1886); *Comanche County* v. *Lewis*, 133 U.S. 198 (1890); *Shapleigh* v. *San Angelo*, 167 U.S. 646 (1897); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

[152] *Atkin* v. *Kansas*, 191 U.S. 207, 221 (1903) (dictum).

[153] *Wright* v. *Council of the City of Emporia*, 33 L.ed.2d 51 (1972); *United States* v. *Scotland Neck City Bd. of Educ.*, 33 L.ed.2d 75 (1972).

[154] See cases cited in note 124, *supra*.

[155] *Haney* v. *County Bd. of Educ.*, 410 F.2d 920, 924, 925 (8th Cir. 1969).

LOSE IN CENTER

C. *The Court Reintroduces Into the Law of the Fourteenth Amendment a Test of Invidious "Motivation" or "Purpose," Which This Court and the Lower Courts Have Rejected in Related Contexts as Inadequate to Protect the Right of Equality.*

Recognizing, apparently, that this settled body of authority (exemplified in its opinion by reference to *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960)), requires federal courts to ignore state internal geographic boundaries and political structures in at least some circumstances where necessary to prevent them from interfering with the enjoyment or effective enforcement of federal constitutional rights, the Fourth Circuit seeks to define the extent of those circumstances in terms of invidious "motivation" or "purpose." [156] *Gomillion* would authorize the assignment of pupils across school district lines, the court concludes, if but only if those lines could be shown to "have been intended to circumvent" the pupils' right to a desegregated education. (A. 580.) Finding no "invidious discrimination in the establishment or maintenance" of the lines around the City of Richmond (A. 562), the court holds them federally impassable.

Whatever one may think about the accuracy of result of this search for illicit motivation,[157] the overriding point is that the search should not have been made. This kind of subjective inquiry into the mental springs of conduct that separates white people from black people or disadvantages the blacks has consistently been rejected by this Court and the lower courts as a methodology of Equal Protection adjudication. Racial animus is no longer—if it ever was—the hallmark of unconstitutional discrimination. As the Court has recently said quite pointedly

---

[156] See text at notes 76-79, *supra*.

[157] See note 131, *supra*.

COPY BOUND CLOSE

of *Gomillion* and cognate cases, "the focus in those cases was on the actual effect of the enactments, not upon the motivation which led the States to behave as they did." *Palmer* v. *Thompson*, 403 U.S. 217, 225 (1971). Conduct, however purposed, whose objective consequences disable blacks in the full enjoyment of their rights as American citizens denies them the equal protection of the laws. *Cassell* v. *Texas*, 339 U.S. 282, 287-290 (1950) (plurality opinion); *Turner* v. *Fouche*, 396 U.S. 346, 360-361 (1970); *Kennedy Park Homes Ass'n* v. *City of Lackawanna*, 436 F.2d 108, 114 (2d Cir. 1970, per Mr. Justice Clark, sitting by designation); *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1170, 1175-1176 (2d Cir. 1972), and cases cited; *Hawkins* v. *Town of Shaw*, 461 F.2d 1171, 1173 (5th Cir. 1972); *Hobson* v. *Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom. Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *cf. Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).[158]

It is important to note, of course, that the issue in this present case is not what kinds of conduct, in what context, with what consequences, are required in order to bring their practitioners *initially* under the ban of the Equal Protection Clause—although even as to the issue of initial violation, "[d]iscriminatory motive and purpose . . . are not necessary ingredients of constitutional violations in the field of public education."[159] Since the day that *Brown*

---

[158] Although *Griggs* arose under Title VII, not the Constitution, the substantive test of forbidden conduct is essentially the same, at least with regard to the sorts of discriminatory conduct with which Duke Power was charged. "Discriminatory preference for any group . . . is precisely and only what Congress has proscribed." (401 U.S., at 431.)

[159] *Cisneros* v. *Corpus Christi Independent School Dist.*, 5th Cir., No. 71-2397, decided August 2, 1972, slip opinion, p. 13. The *Cisneros* case involved the question whether Mexican-American children were unconstitutionally segregated in the Corpus Christi

E IN CENTER

v. *Board of Education* was announced in 1954, the Richmond schools have been operated in violation of the Equal Protection Clause; and the question in this case is what conduct will suffice to end that violation by extirpating racially identifiable schools so as to achieve a "unitary system in which [that] racial discrimination would be eliminated root and branch."[168] Racial identifiability, as the District Court noted, involves "a perception of students, faculty and community perception" (A. 187; 338 F. Supp., at 80) in the "historical context within which a school of disproportionate composition exists" (*ibid.*). That historical context, in Richmond, is one of long-persisting, deep-set, all-pervading racial segregation of the public schools (see pp. 6-13, 18-20, 34-36, *supra*) and of public and private racial discrimination in housing, employment, and every other phase of social life (see pp. 24-25, *supra*). In this setting, the consequences for achieving a unitary school system of the maintenance of school district lines requiring pupils to be assigned to 70% and 80% black city schools and 90% or 100% white county schools that are close together within a socially and economically integrated area do not depend upon "motivation." Nor should their legality. The test should be "effect—not . . . purpose

---

school system. Like blacks, they were and long had been isolated in racially identifiable schools; but, unlike the isolation of blacks, theirs had never had a statutory base. The Fifth Circuit, sitting *en banc*, concluded that the isolation of Mexican-Americans from anglos in the public schools, caused by various school board actions not shown to be racially motivated, constituted unconstitutional segregation. "[T]his Court has never tempered its prohibition of school board actions that create, maintain, or foster segregation by the requirement that a discriminatory intent be shown." (*Id.*, at p. 16.) "School cases serve to emphasize the correctness of this principle [that the constitutional test is effect, not motive], for regardless of motive, the children . . . suffer the same. . . ." (*Id.*, at p. 17.)

[168] *Green* v. *County School Bd.*, 391 U.S. 430, 438 (1968).

COPY BOUND CLOSE

or motivation— . . .in determining whether it is a permissible method of dismantling a dual system." [161]

This is what the "splinter district" cases last Term held, under less compelling circumstances. *Wright* v. *Council of the City of Emporia*, 33 L.ed. 2d 51 (1972); *United States* v. *Scotland Neck City Bd. of Educ.*, 33 L.ed. 2d 75 (1972). Although there was disagreement among the Justices upon the facts of *Wright*, there was none upon the proposition that motive was an improper Fourteenth Amendment standard, and that the decisive issue was whether the "operation of a separate school system would either perpetuate racial segregation in the schools of the . . . area or otherwise frustrate the dismantling of the dual system in that area." [162] That decisive criterion, employed by the District Court and rejected by the Court of Appeals below, is also applicable here. For the adventitious difference that Emporia region lay under court mandate whereas the Richmond region lay under the long unfulfilled obligation of *Brown* (I) surely is immaterial to the question whether the measure of desegregation is "effectiveness" [163] or motivation.

D. *The Decision Unduly Curbs the Vital Power of the Federal Courts to Remedy Unconstitutional School Segregation, and Trammels the Traditional Flexibility of Equitable Relief That Was Reconfirmed in School Cases by* Swann.

The Court of Appeals' decision proceeds essentially in three steps. The first step is to assert that the Richmond City schools must be considered in entire isolation—as

[161] *Wright* v. *Council of the City of Emporia*, 33 L.ed.2d 51, 61 (1972).

[162] *Wright* v. *Council of the City of Emporia*, 33 L.ed.2. 51, 66 (1972) (Chief Justice Burger, dissenting).

[163] *Davis* v. *Board of School Comm'rs* 402 U.S. 33, 37 (1971).

E IN CENTER

though the city limits were the edge of the known world—in determining whether they have achieved the character of a "unitary" [164] system. The second step asserts that, so considered, they have. We have directed Subparts IV(A), (B) and (C), *supra*, to these two steps. The first involves the errors that we have respectfully suggested, and the second falls with the first.

The Court of Appeals' third step asserts that, once the District Court succeeded by its successive decrees in making the Richmond schools "unitary" in this isolated sense, all its equitable powers instantaneously went out like a light. This third step falls with the first two; but it also involves an independent misconception of such magnitude as to command this Court's review and correction. For it amounts to saying that federal equity to enforce *Brown* v. *Board of Education* is a pale shadow of its ordinary self.

Throughout the years, the Court has used the strongest possible terms in describing federal equity's resources to secure "complete justice." [165] Only last Term, the Court once again sounded that theme, and said that equitable relief "is not limited to the restoration of the *status quo ante*. There is no power to turn back the clock. Rather, the relief must be directed to that which is 'necessary and appropriate in the public interest to *eliminate the effects . . .*'" of whatever evil has required equity's intervention.[166] It goes without saying that, if the litigation is protracted and the evil takes on new forms, equity has

---

[164] See note 82, *supra*.

[165] *Brown* v. *Swann*, 35 U.S. (10 Pet.) 497, 503 (1836). *See, e.g., Camp* v. *Boyd*, 229 U.S. 530, 551 (1913); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944).

[166] *Ford Motor Co.* v. *United States*, 405 U.S. 562, 573 n. 8 (1972) (emphasis in original).

COPY BOUND CLOS

ample power to pursue it.[167] Indeed, it is "the duty of the court to modify . . . [a] decree so as to assure the complete extirpation of the illegal" conduct.[168]

Once such conduct has been found, "equity has the power to uproot all parts of an illegal scheme—the valid as well as the invalid."[169] This point has been made again and again in anti-trust cases.

> "A trial court upon a finding of a conspiracy in restraint of trade and a monopoly has the duty to compel action by the conspirators that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance. Such action is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with the acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited."[170]

If the federal courts have as ample powers to enforce the Constitution as the anti-trust laws—and this seems to be the least implication of *Brown* (II) and *Swann*—then the test of their appropriate exercise is "effectiveness"[171] to assure "that state-imposed segregation has been completely removed," "eliminated root and branch."[172] Under

---

[167] See, *e.g.*, *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971) (dictum).

[168] *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 251 (1968).

[169] *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 148 (1948).

[170] *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88-89 (1950). In addition to the cases cited in *Gypsum*, see, *e.g.*, *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 189-190 (1944); *United States* v. *Loew's, Inc.*, 371 U.S. 38, 53 (1962).

[171] *Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 37 (1971).

[172] *Green* v. *County School Bd.*, 391 U.S. 430, 438, 439 (1968).

SE IN CENTER

this standard, the District Judge here had "not merely the power but the duty to render a decree which [would] . . . so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." [173] He was not restricted, in his means of disestablishing Richmond's dual school system, to forms of school district organization that might have passed constitutional muster if voluntarily adopted by the Virginia school authorities 75, or 18, or 10 years ago—or which, "viewed alone," [174] would not violate the Constitution even today. He was not obliged to ignore patterns of population growth which, occurring during long years of non-compliance with *Brown*, had finally turned the Richmond City schools so black that compliance with *Brown* limited to the City's borders would remain "pathetically incomplete" (A. 237; 338 F. Supp., at 103.)

What the District Judge here did was precisely to take account of these principles and these "practicalities." [175] He found that:

> . . . long years of maintenance of the dual system, many subsequent to formal legal declaration of its invalidity, massive and effective state-managed efforts to oppose desegregation under free choice assignment plans which caused more and more facilities in the area to become segregated by a process of white withdrawal and black occupation, have, together with [other] . . . forces . . . containing blacks in the city, produced a community school system divided into racially identifiable sectors by political boundaries. The problem has intensified with passing years, but its growth has been

---

[173] *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965).

[174] See text at note 170, *supra*.

[175] *Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 37 (1971).

COPY BOUND CLOSE

> foreseeable and all officials were well advised of its coming. At present, the disparities are so great that the only remedy promising of immediate success—not to speak of stable solutions—involves crossing these lines. (A. 230; 338 F. Supp., at 100.)

Finding further that these particular school district lines "are unrelated to any administrative or educational needs" (A. 103; 338 F. Supp., at 83), so that their use as categorical limits upon pupil assignment was not required by any legitimate state interest,[176] he ordered that the lines be crossed.

Such relief is squarely in the grain of the traditional powers of federal equity. To deny the district courts all competence to give it, as the Court of Appeals has done, breaks sharply with that tradition. It abridges the "breadth and flexibility" [177] of remedies necessary to vindicate the right declared in *Brown* v. *Board of Education*, and thereby intolerably restricts the force of *Brown* itself.

---

[176] *Cf. McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964); *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967).

[177] *Swann*, 402 U.S., at 15.

E IN CENTER

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
10 Columbus Circle
New York, New York 10019

LOUIS R. LUCAS
525 Commerce Title Building
Memphis, Tennessee 38103

WILLIAM L. TAYLOR
Catholic University Law School
Washington, D.C.

JAMES R. OLPHIN
214 East Clay Street
Richmond, Virginia 23219

M. RALPH PAGE
420 North First Street
Richmond, Virginia 23219

ANTHONY G. AMSTERDAM
Stanford University Law School
Stanford, California 94305

Attorneys for Petitioners

COPY BOUND CLOSE IN CENTER